

(21,682.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 225.

A. H. GRIGSBY, PETITIONER,

vs.

R. L. RUSSELL AND LILLIE BURCHARD, ADMINISTRATORS OF JOHN C. BURCHARD, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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a Certified Copy.

No. 1864.

United States Circuit Court of Appeals, Sixth Circuit.

R. L. RUSSELL and LILLIE BURCHARD, Adm'rs of John C. Burchard,
Deceased, Appellants,
vs.
A. H. GRIGSBY, Appellee.

Appeal from the Circuit Court of the United States for the Middle
District of Tennessee.

Record.

Original Transcript Filed August 3, 1908.

Filed Oct. 17, 1908.

FRANK O. LOVELAND, *Clerk.*

1 *Transcript of Record.*

At a regular term of the Circuit Court of the United States for the Middle District of Tennessee, begun and holden at the custom house in Nashville, Tennessee, upon the first Monday of April, 1907, present and presiding the Hon. H. D. Clark, judge, etc., the following proceedings were had, to-wit:

Upon the 29th day of January, 1907, a bill was filed as follows, to-wit:

In the Circuit Court of the United States for the Middle District of Tennessee.

No. 3491. Equity.

PENN MUTUAL LIFE INSURANCE COMPANY
vs.

A. H. GRIGSBY et al.

To the Honorable the Judges of the United States Circuit Court for the Middle District of Tennessee:

The Penn Mutual Life Insurance Company, a corporation organized under the laws of the state of Pennsylvania, a citizen of Pennsylvania, and qualified to do business in the state of Tennessee, brings this its bill of complaint against A. H. Grigsby and R. L. Russell and Miss Lillie Russell, the last two being administrators

of the estate of John C. Burchard, deceased, all residents and citizens of Hickman county, in the state of Tennessee.

Complainant states and shows as follows:

Complainant is a corporation organized under the laws of the state of Pennsylvania and is a citizen of the state of Pennsylvania. On January 26, 1903, it issued to one John C. Burchard, deceased, a policy of insurance on his life, No. 230,176, for \$10,000.00. Four annual premiums were paid thereon, carrying the policy in force up to January 26, 1907. The said policy was written payable to the estate of the insured and on February 10, 1905, was assigned by the insured to the defendant, A. H. Grigsby, the consideration being stated as \$100.00 and the assignment being in writing.

On the 13th day of December, 1906, the said insured, John C. Burchard, died at the town of Centreville, in Hickman county, Tennessee.

After death proofs of loss or proofs of death were filed with complainant and complainant was preparing and intending to pay the amount of said policy to the assignee, the defendant Grigsby, when it was notified that application would be made for the appointment of administrators of the estate of said John C. Burchard and that the said assignment of said policy to defendant Grigsby was fraudulent, illegal and void and would be contested.

After this notice to complainant, letters of administration were taken out on the estate of the said Burchard by the defendants, R. L. Russell and Miss Lillie Burchard in the county court of Hickman county, Tennessee. After their appointment as administrators, complainant was notified, through its agents and attorney, by the said administrators not to recognize said assignment to said Grigsby and requested to pay the money over to them as the persons legally entitled to the same. Complainant was also notified that suit would be brought against it by the said administrators to recover the amount of said policy.

Complainant is also informed and states that the said A. H. Grigsby, claiming to be assignee of said policy, intends to bring suit and is now preparing to do so.

Complainant is indifferent as to whom said money shall be paid and is willing to pay it to either, if it would be safe to do so.

Complainant is informed that the administrators of the said Burchard claim that said assignment is fictitious and without consideration; that the consideration of \$100.00 is merely nominal. Complainant has also been informed that it will be claimed and proved that the said A. H. Grigsby was in no way related to the said Burchard, was not a creditor of his and had no insurable interest in the life of said Burchard; and that any arrangement that may have been made between Burchard and Grigsby would be void upon the ground that the assignment was a gambling and wagering contract, besides not being based upon a valid consideration.

Whatever may be the grounds, complainant states that it is threatened with two suits, one by the administrators and the other by the assignee, Grigsby; and that it would be placed in great jeopardy and might not be able to protect itself.

Complainant is therefore advised that, under the circumstances, it has a right to file a bill of interpleader in this court and bring said parties before the court and let them, by litigation in the said interpleader cause as between themselves, determine who is entitled thereto. Complainant will pay the money into court and is ready to do so upon the order of the court and it hereby offers to pay the full amount of said policy into the registry of the court and let the fund stand subject to the future orders of the court in this cause.

Premises considered, complainant prays that process issue and that defendants be required to answer this bill; that this bill be sustained as a bill of interpleader; that it be allowed to pay said insurance fund into this court; and that defendants Grigsby and the administrators of Burchard, deceased, be required to interplead as between themselves; and that their respective rights be settled herein. Complainant also prays that a restraining order issue forthwith, restraining the said defendants, or either of them, from bringing suits against this complainant upon said policy and that a writ of injunction be granted to that effect.

This is the first application for a restraining order or writ of injunction in this cause.

Complainant prays for general relief in the premises.

JAMES C. BRADFORD, *Solicitor*.

Endorsed: Filed at 10:7 o'clock a. m., January 29, 1907. H. M. Doak, Clerk.

The following writ was issued and executed, to-wit:

The President of the United States of America to the Marshal of the Middle District of Tennessee, Greeting:

You are hereby commanded to summon A. H. Grigsby, a citizen and resident of Hickman county, state of Tennessee, and R. L. Russell and Miss Lillie Burchard, administrators of John C. Burchard, deceased, also resident citizens of Hickman county, state of Tennessee, if to be found in your district, to be and appear before the judges of the Circuit Court of the United States for the Middle District of Tennessee, in the Sixth Circuit, at the Federal court room, at Nashville, in said state, on the first Monday of March next, then and there to answer the bill of complaint of the Penn Mutual Life Insurance Company, a corporation organized and existing under the laws of the state of Pennsylvania and a citizen of said state, praying injunction, etc. Herein fail not and have then and there this writ.

Witness the Honorable Melville W. Fuller, chief justice of the United States, this the 29th day of January, in the year of our Lord nineteen hundred and seven and of the Independence of the United States the one hundred and thirty-first year.

[SEAL.]

H. M. DOAK, *Clerk*.

Memorandum: The defendants are required to enter their appearance in the office of the clerk of this court on or before
 4 the 4th day of March next and plead, answer or demur, or the bill will be taken for confessed and set down for hearing ex parte.

H. M. DOAK, *Clerk.*

Endorsed: No. 3491. United States Circuit Court. Penn Mutual Life Insurance Company versus A. H. Grigsby, et al. This summons issued on the 29th day of January, 1907. H. M. Doak, Clerk.

Returned: Within writ came to hand January 29, 1907, and served January 30, 1907, by reading to A. H. Grigsby and also to R. L. Russell and Lillie Burchard as administrators of John C. Burchard, deceased, at Centreville, Tenn., and delivering to each a copy of this writ and also a copy of petition.

JOHN W. OVERALL,
United States Marshal.

By J. M. DUGGAN,
Deputy Marshal.

The following writ of restraint was issued, to-wit:

The President of the United States of America to the Marshal of the United States for the Middle District of Tennessee—Greeting:

You are hereby commanded to make known unto A. H. Grigsby and R. L. Russell and Lillie Burchard, administrators of John C. Burchard, deceased, residents and citizens of Hickman county, state of Tennessee, the following order, made by the Honorable Horace H. Lurton, judge of the Circuit Court of the United States for the Middle District of Tennessee, in a cause therein pending, wherein the Penn Mutual Life Insurance Company, a corporation chartered and existing under the laws of the state of Tennessee, is complainant and A. H. Grigsby, R. L. Russell and Lillie Burchard, administrators of John C. Burchard, deceased, are defendants, as follows, to-wit:

No. 3591. Equity.

PENN MUTUAL LIFE INSURANCE COMPANY,

VS.

A. H. GRIGSBY et al.

This cause coming on to be heard upon the bill of complaint, filed at 10:7 o'clock a. m., this January 29, 1907, and the bill having been read and understood by the court it is hereby ordered that the defendants thereto, A. H. Grigsby and R. L. Russell and Lillie Burchard, administrators of John C. Burchard, deceased, residents of Hickman county, state of Tennessee, appear before the judges of this court upon the first Monday of March, 1907, being a rule day and being the fourth day of said month, and show cause why a

restraining order or a preliminary writ of injunction shall not issue out of this court, restraining and enjoining them from bringing separate suits and from bringing suits other than said proceedings by interpleader upon the policy of insurance of the complainant upon the life of John C. Burchard, as set out in said bill; and also to show cause why the complainant should not be allowed as prayed in the bill, to pay the amount of said policy into this court, to await the result of such proceedings by interpleader; and, in the meantime, said defendants are hereby restrained from bringing any suit until the day fixed for said hearing.

And you are commanded to enjoin upon the said A. H. Grigsby, R. L. Russell and Lillie Burchard, the last two being administrators of John C. Burchard, deceased, to appear upon said day, March 4, 1907, and show cause, if any there be, why they should not be enjoined and why they should not interplead and why the complainant should not pay said amount of said policy into this court, as prayed in said bill, under penalty of the law; and due return make hereof.

Witness the Hon. Melville W. Fuller, chief justice of the United States, this the 29th day of January, 1907, and of American Independence the one hundred and thirty-first year.

H. M. DOAK, *Clerk.*

Endorsed: Original. No. 3491. United States Circuit Court. Penn Mutual Life Insurance Company vs. A. H. Grigsby, et al. Restraining order. This writ issued on the 29th day of January, 1907. H. M. Doak, Clerk.

Returned: Within writ came to hand January 29, 1907, and served January 30, 1907, by reading to A. H. Grigsby at Centreville, Tenn., and to R. L. Russell and Lillie Burchard, as administrators of John C. Burchard, deceased, at Centreville, Tenn., and delivered to each a copy of this writ.

JOHN W. OVERALL,

United States Marshal.

By J. M. DUGGAN,

Deputy Marshal.

The following precipe for appearance was filed, to-wit:

Mr. H. M. Doak.

DEAR SIR: You will please enter the names of myself and Mr. J. A. Bates as attorneys for the administrators, defendants in the case of Penn Mutual Life Insurance Company vs. A. H. Grigsby, et al., lately filed in your court. This case is set for next Monday on the hearing for preliminary injunction. We do not propose to question the propriety of the bill for interpleader, but I have an agreement with both Mr. Pitts, who represents the other defendant, and Mr. J. C. Bradford, allowing us until the first Monday of April to file our answer. You can enter appearance for Russell and Burchard.

Yours,

GEO. T. HUGHES.

Endorsed: Filed March 1, 1907. H. M. Doak, Clerk.

The following answer was filed by A. H. Grigsby, to-wit:

In the Circuit Court of the United States for the Middle District of Tennessee.

No. 3491. Equity.

PENN MUTUAL LIFE INSURANCE COMPANY,

vs.

A. H. GRIGSBY, et al.

The separate answer of A. H. Grigsby to the bill of interpleader of the Penn Mutual Life Insurance Company in above entitled cause.

Defendant admits the corporate character of complainant and its proper qualification to do business in Tennessee, as alleged in the bill.

Defendant admits that complainant, on the 26th day of January, 1903, issued to John C. Burchard, now deceased, a policy of insurance on his life, No. 230166, for \$10,000.00, that premiums were paid thereon, carrying the policy in force to January 26, 1907, as alleged in the bill and that said policy was written and made payable to said Burchard's "executors, administrators or assigns."

Defendant admits that said policy was duly assigned in writing and delivered to this defendant by the said assured, in consideration of the payment by the defendant to said assured of the sum of one hundred dollars in cash and the other considerations recited in the said written assignment, which was made in February, 1906, the said assignment or a duplicate thereof being furnished to complainant and the same assented to by complainant.

It is admitted that said assured died in Hickman county, Tennessee, his home, on or about the date stated in the bill; that after his death, proofs thereof were duly made and filed with complainant by this defendant; and it may be also true, although this defendant has no personal knowledge, that while complainant was preparing to pay said policy to this defendant, it was notified, as stated in the bill, that application would be made for the appointment of administrators of the said assured, Burchard, and that said assignment to this defendant was fraudulent, illegal and void, and would be contested.

7 It is true that administrators of the estate of said assured have been appointed recently, as alleged in the bill; but what notice they have given since to complainant as to not recognizing the assignment to this defendant and as to the alleged grounds of its invalidity claimed by them, defendant is not advised except by the statements of the bill. Defendant, however, says that the said assignment was not fraudulent, illegal or invalid for any reason and he stands ready to meet and repel any charges of that kind whenever they shall be made by said administrators or by any one else claiming an interest in the proceeds of said policy.

Defendant, further answering, says he was not preparing to bring

suit on said policy, as he was expecting voluntary payment thereof and the complainant had made no intimation that it would not voluntarily pay the same; and defendant had voluntarily offered to complainant, if it desired, such protection out of abundant caution, to enter into bond with good and approved security in any reasonable amount, to secure and save the complainant harmless against any loss or damage it might sustain by reason of payment to him, to which offer the complainant had made no reply. Defendant, however, admits that he intended to bring suit on said policy and that he would have done so, if not paid in a reasonable time.

This defendant is not disposed to dispute the right of complainant to file its bill of interpleader and is willing that the same may be sustained; and that upon its payment into the registry of this honorable court of the amount due on said policy, which should include interest from the date of final proof of death and defendant's offer to make bond, to-wit: January 10th, 1907, it may be discharged from all further liability.

This defendant therefore joins complainant in the prayer that the administrators of the said John C. Burchard be required, without delay, to implead this defendant by setting forth in a cross-bill, or other proper pleading, their grounds of attack upon said assignment to this defendant, to be answered by him and determined by this honorable court upon full proof of the facts.

And in the meantime, defendant respectfully asks that the fund so to be paid into the registry by complainant, be loaned at interest and upon good security to be approved by the court or clerk, and that this defendant may be permitted to borrow the same on such terms as the honorable court may prescribe.

8 And now having fully answered, defendant prays to be hence dismissed with his reasonable costs.

A. H. GRIGSBY, *Defendant.*
KNIGHT & BEASLEY,
PITTS & McCONNICO,
Solicitors for Defendant.

STATE OF TENNESSEE,
County of Hickman, ss:

Before me, the undersigned notary public in and for the county and state aforesaid, comes A. H. Grigsby, the above-named defendant, and makes oath that the above and foregoing answer is true to the best of his knowledge, information and belief.

A. H. GRIGSBY.

Sworn to and subscribed before me, this 6th day of February, 1907.

[SEAL.]

T. W. HORNER,
Notary Public.

My commission expires the — day of July, 1909.

T. W. HORNER,
Notary Public.

Endorsed: Filed February 8, 1907. H. M. Doak, Clerk.

The following answer was filed by R. L. Russell and Lillie Burchard, to-wit:

In the Circuit Court of the United States for the Middle District of Tennessee.

No. 3491. Equity.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

The separate answer of R. L. Russell and Miss Lillie Burchard, administrators of John C. Burchard, deceased, to the bill of interpleader of Penn Mutual Life Insurance Company in the above-styled cause.

Defendant- admit the corporate character and residence of the complainant as stated in the bill and that *is it* authorized to do business in Tennessee *is* alleged.

They admit the issuance to John C. Burchard, now deceased, on the 26th of January, 1903, of a policy of insurance on the life of the said John C. Burchard, No. 230176, for ten thousand dollars, that the four annual premiums were paid thereon carrying the policy in force to the 26th of January, 1907.

They admit that said policy was written payable to the estate of said insured and that on or about the 10th of February, 1905, for the consideration of \$100 said policy was assigned in writing to their co-defendant, A. H. Grigsby, under the circumstances as hereinafter stated.

9 They admit that on the 13th of December, 1906, said insured, John C. Burchard died in the town of Centreville, Hickman County, Tennessee, and that proofs of death or loss were filed with the complainant as alleged.

They admit that they did notify complainant that application would be made for the appointment of an administrator upon the estate of the said John C. Burchard and that the assignment of said policy to the defendant Grigsby was fraudulent, illegal and void and that the same would be contested. And they now again reiterate said statement that said assignment was fraudulent, illegal and void for the reasons which will be hereinafter stated.

It is true that letters of administration were taken out by these defendants upon the estate of the said John C. Burchard in the County Court of Hickman County and thereafter they notified complainant through its agents and attorneys not to recognize said assignment to said Grigsby and demanded and requested that the money due upon said policy should be paid over to them as the persons legally and equitably entitled to the same; and that, in the event of the failure of complainant to pay said sum to them, that suit would be instituted to recover the same. Defendants do not of their own

knowledge know but suppose it to be true that their co-defendant intended to bring suit upon said policy and was preparing to do so.

Defendants admit *that* right of complainant to file this bill of interpleader and *is* willing that the same may be sustained and the money due upon said policy paid into this honorable court to be held subject to the future orders and decrees of the court upon the determination of the rights of the parties thereto. They are also willing that such rights shall be determined by this court under such form of procedure as the court shall see proper to direct in the cause.

And defendants are ready to take such steps as shall be directed by this court in order that proper issues may be made for the determination of the rights of the parties to such funds.

And defendants now for further answer to said bill of *complaint*, state that at the time of said alleged transfer and assignment of the policy to their co-defendant Grigsby, that said Grigsby did not then nor has he now any insurable interest in the life of said deceased John C. Burchard. He was in no way related to said Burchard, nor was he a creditor of his and that for that reason if or no other, said assignment was void and a gambling and wagering contract; that said Grigsby only paid to the deceased the sum of \$100 as a consideration for said transfer and assignment and obligated himself to pay the premiums which might accrue thereon in order to keep said policy alive.

The defendant further states that said deceased had during childhood been subject to fits of epilepsy and that for some months prior to the time of the assignment or attempted assignment of said policy that he had suffered with a return of said disease and that a few days prior to the making of said assignment in a fit of epilepsy deceased fell with his head into a fire, that he was seriously burned, that portion of his head in the fire being burned so that the flesh thereon was destroyed, and the bone seriously burned, so that an operation became imperative and deceased was expecting to have said operation performed immediately; that he was at that time in imminent danger of death as the result of said burn and was suffering greatly both mentally and physically as the direct immediate result of the said injury; and that his mind was greatly enfeebled and impaired by said suffering, so that he was mentally incapable of transacting business, especially of transacting business of such character and importance as the assignment of said policy.

Defendants further state that their co-defendant, A. H. Grigsby, well knew of the condition of said deceased and while he was suffering from the effects of said burn and in great physical and mental distress and with a knowledge on the part of said Grigsby that his life was in serious danger by reason thereof, he caused and procured said deceased for the sole and only consideration of one hundred dollars paid to said deceased to transfer said policy of insurance to him the said Grigsby. That said sum of \$100 was a grossly inadequate sum for the transfer of said policy. That for years prior to said burns and injury by fire and the transfer of said policy to Grigsby said Burchard was unbalanced as a result of fits in the early

part of his life, rendering him incapable of rationally transacting business, being irrational and unsuccessful in his dealings and methods of business, that in addition to these bodily and mental troubles said Burchard was at the time in great mental distress over litigation involving his property and a receiver was about to be applied for to take charge of his property and was then pending before the court. *Complainants* further state that co-defendant Grigsby was a close and intimate friend and advisor of deceased in all of his business matters and that he reposed great confidence in his fidelity as a friend and that by reason of this relation existing between them co-defendant Grigsby possessed great influence over the mind and conduct of the deceased Burchard and as *complainants* charge said Burchard was greatly influenced and persuaded by the said defendant A. H. Grigsby in procuring said assignment to be made so that the same was not the intelligent and free act of said deceased.

Defendants further state that by the terms of said policy it is provided therein under title on the face of said policy "guaranteed privileges, benefits, and conditions," in the 6th paragraph thereof that "any claim against the company arising under any assignment of this policy shall be subject to proof of interest." By which it was meant and intended as these defendants insist and charge that the party to whom such assignment was made or might be made must have an insurable interest in the life of the party assured. And the same was made a part of the terms of said policy. So that by the very terms thereof any assignment of said policy to one having no such insurable interest would as these defendants insist be void and of no effect.

Defendants are willing that the amount that was so paid to deceased by their co-defendant, A. H. Grigsby, to-wit, the sum of \$100 and any amounts paid by him for the premiums on said policy may be refunded to said Grigsby out of the amount due upon said policy.

And now having fully answered defendants pray to be hence dismissed with their reasonable costs.

R. L. RUSSELL
LILLIE BURCHARD.

GEO. T. HUGHES,
BATES & BATES,
Solicitors for Defendants.

STATE OF TENNESSEE,
County of Hickman, ss:

Personally appeared before me the undersigned notary public in and for said state and county duly commissioned and qualified, my commission expiring on the 3rd day of July, 1910, the above-named R. L. Russell and Lillie Burchard who made oath that the facts stated in the foregoing answer are true to the best of their knowledge and belief.

R. L. RUSSELL.
LILLIE BURCHARD.

Sworn to and subscribed before me, this the 29th day of March, 1907.

DOUGLAS T. BATES,
Notary Public.

[SEAL.]

Endorsed: Filed April 1, 1907, H. M. Doak, Clerk, by E. L. Doak, Deputy Clerk.

The following order was made and entered of record, to-wit:

2

No. 3491. Equity.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

This cause came on for hearing before the Hon. Chas. D. Clark, Judge, this day upon the motion of defendant, A. H. Grigsby, filed April 8, 1907.

And thereupon by agreement of parties by their counsel it is ordered by the court:

1. That complainant's bill be and it is sustained as a proper bill of interpleader.

2. That complainant pay into the registry of the court the full amount of the policy of insurance mentioned in the bill, to-wit, the sum of ten thousand dollars (without interest) if paid within ten days, and that upon such payment being made, the complainant be and it hereby is discharged from all further liability on said policy and dismissed from this case free of all costs and that the taxation of costs on said bill be reserved until the hearing between the defendants claimants of said fund.

3. That the clerk loan out said fund, when paid in on note with good and solvent security to be approved by the clerk, payable on demand and bearing interest at 6 per cent per annum; and that defendant A. H. Grigsby be given preference in borrowing said fund on his compliance with this order.

4. That defendants, the administrators of John C. Burchard, within thirty days from this date give security for costs and file their complaint against defendant Grigsby, setting forth the grounds of their attack upon the assignment of said policy of insurance; and that said Grigsby have ten days after notice of the filing of said complaint in which to answer same.

Enter this.

CLARK, J.

O. K.

PITTS.
BRADFORD.

Entered "FF," page 227, April 19, 1907.

Thereupon the following cross-bill was filed, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

No. 3491. Equity.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

To the honorable judges of the Circuit Court of the United States for the Middle District of Tennessee:

R. L. Russell and Miss Lillie Burchard, administrators of John C. Burchard, deceased, resident and citizens of Hickman county, state of Tennessee, bring this their bill of complaint against
13 A. H. Grigsby, a citizen and resident of Hickman county, Tennessee.

Complainants state and show as follows:

That on the 26th of January, 1903, the Penn Mutual Life Insurance Company of Philadelphia, a corporation organized and existing under the laws of the state of Pennsylvania and a citizen of Pennsylvania, but authorized to and qualified to do business in the state of Tennessee, issued to one John C. Burchard, deceased, a policy of insurance on his life, No. 230176, for the sum of ten thousand dollars, in consideration of the payment of \$225.40, paid in cash at the date of said policy and the like annual premium of \$225.40, to be paid on the 26th of January of every year during the life of the insured. Said policy is in the possession of the defendant, A. H. Grigsby and complainant asks that defendant Grigsby shall be required to produce and file the same in this court.

Four annual premiums were paid upon said policy, carrying same in force up to the 26th of January, 1907. By the terms thereof it was written payable to the estate of the said John C. Burchard, his executors, administrators, or assigns.

On the — day of February, 1905, said policy of insurance was assigned to defendant A. H. Grigsby under the circumstances hereinafter more fully stated, said assignment being in writing but not endorsed upon said policy of insurance.

Upon the 13th day of December, 1906, the said insured, John C. Burchard died intestate in the town of Centreville, in Hickman County, Tennessee, and these complainants were duly and regularly appointed administrators of his estate, were qualified and entered upon the discharge of their duties as such. Copies of their letters of administration will be filed in this cause when it is necessary and then asked to be made a part of this bill, marked exhibit letters of administration.

After the death of said Burchard proofs of death or loss were filed with said insurance company and the defendant Grigsby notified said company that he would demand and expect the payment of said policy by said company to the defendant Grigsby and that

in case of failure or refusal to pay such would be instituted by said Grigsby to recover the same from said company.

And later complainant also notified said company that application would be made for their appointment as administrators of the estate of said Burchard, and that said assignment of said policy to the defendant Grigsby was fraudulent, illegal and void and would be contested. Thereafter complainants were appointed as such administrators and after such appointment again notified said insurance company not to recognize said assignment to defendant Grigsby and demanded and requested that the amount due upon said policy should be paid over to them as the persons legally and equitably entitled to the same, and that in the event of the failure or refusal of said insurance company to pay said sum over to them that suit would be instituted against said company to recover the same.

Thereupon the Penn Mutual Life Insurance Company filed its bill in this honorable court against complainants and against A. H. Grigsby under the above style, in which bill the facts hereinbefore stated are recited and said insurance company further stated that it was threatened with two suits, one by the administrators, and the other by the defendant Grigsby, and that it was placed in jeopardy thereby, and might not be able to protect itself. It therefore asked of this court that it be permitted to file its bill of interpleader in this court and to bring the parties before the court and let them by litigation determine the question as to who was entitled to said sum. This bill was answered by complainants and by defendant each of said parties setting up their claims to said policy of insurance or the amount due thereon and each agreeing that the bill of interpleader was properly filed and submitted to the jurisdiction of the court. Thereupon it was ordered by the court that said fund be paid into this court, to be held subject to the adjudication by the court as to the rights of the parties, and complainants were directed to file their bill in court setting up their claim to said fund and to give bond for the costs of the cause. All of which proceedings, pleadings and records are on file in this cause in this court and are here referred to and are asked to be made part of this bill, but the same need not be copied.

Now, therefore, come these complainants and state and show unto the court that said assignment of said policy by the insured intestate to the defendant Grigsby was fraudulent, illegal and void, for the following reasons: At the time of said alleged transfer and assignment of said policy to defendant Grigsby said Grigsby did not then have, nor has he now, any insurable interest in the life of said deceased John C. Burchard. He was in no way related to said Burchard, nor was he a creditor of his, and that said assignment was void and gambling and wagering contract.

Complainants further state and show that said deceased had during his childhood been subject to fits of epilepsy and that for some months prior to the time of the assignment or attempted assignment of said policy, that he suffered with a return of said disease, and that a few days prior to the making of said assignment, in a

fit of epilepsy, the deceased fell with his head into a fire and was seriously burned, that portion of his head in the fire being so burned that the flesh thereon was destroyed and the bones so affected as to render an operation imperative, and that while suffering from the physical and mental anguish from such injuries and expecting to have said operation performed and being at the time in imminent danger of death as a result of said burn, and his mind being greatly enfeebled and impaired by said suffering, so that he was both physically and mentally unable to transact business and while in this condition he made to defendant Grigsby the assignment of said policy which is now relied on by said defendant.

Complainants further state that defendant Grigsby well knew the condition of said deceased, that he was closely and intimately associated with him, had great influence over him. And while in this condition caused and procured and influenced him to assign said policy to him, defendant Grigsby, for the sole and only consideration of the sum of one hundred dollars and a further consideration that he would pay the premiums thereafter to become due under said policy.

Complainants state that the sum of one hundred dollars was a grossly inadequate sum for the transfer of said policy.

Complainants now further state and show that not only was the intestate John C. Burchard's mind seriously affected by said injuries as a result of said burn, but that previous to said accident he was of unsound mind and not competent to transact business; that he engaged in wild speculations and was a spendthrift, was largely in debt, and that this policy of insurance had been taken out by said Burchard originally with the understanding with said creditors of said Burchard that the same was to be taken out for their benefit and to secure the indebtedness due to them, and that upon the faith of this promise upon the part of said intestate extension of loans against him had been allowed and other loans obtained. That the insolvency of the estate of said Burchard has been suggested and that there are no other assets out of which the debts can be paid, except out of the funds derived from the life insurance of the said intestate.

16 All of which facts as complainants are informed and upon which information they charge to be true was within the knowledge of the defendant Grigsby.

Complainants further state that by the terms and conditions of said policy it was provided that any claim against said insurance company arising under any assignment of said policy should be subject to proof of interest and that no assignment would impose any obligation on the company until it had received an original or the duplicate thereof, and that the company did not guarantee the sufficiency or validity of any assignment.

Complainants charge that by such terms of said contract it was understood and meant that the same was not assignable except to such person as under the law might have an insurable interest in the life of said intestate.

These complainants are willing that the defendant Grigsby shall

be reimbursed for the amount of money expended by him under said assignment, that is to say that he shall be repaid the sum of \$100 and the premiums paid by him on said policy, with interest thereon. But the remainder of said sum is, as complainants insist, properly, legally and equitably due to these complainants as administrators of John C. Burchard, deceased.

Now therefore in consideration of the premises complainants pray that process issue with a copy of this bill, that the same be served upon defendant Grigsby, and that he be required to answer the same, but not upon oath, and upon final hearing they pray that said assignment be declared void, illegal and fraudulent, and that said sum paid into this court be adjudged to belong to and be the property of these complainants as administrators of the estate of John C. Burchard, deceased, and that the same be paid over to them.

Complainants pray for any further and different relief which they may be entitled to under the premises.

BATES AND BATES,
GEO. T. HUGES,
Solicitors for Complainants.

STATE OF TENNESSEE,
County of Hickman, ss:

Personally appeared before me, Douglas Bates, notary public in and for said state and county duly qualified and commissioned, R. L. Russell and Lillie Burchard who make oath that the facts stated in the foregoing bill are true as they are therein stated.

R. L. RUSSELL.
LILLIE BURCHARD.

17 Sworn to and subscribed before me, this the 2nd day of
May, 1907.

[SEAL.]

DOUGLAS BATES,
Notary Public.

Endorsed: Filed May 6, 1907, H. M. Doak, Clerk.

The following answer and demurrer was filed by A. H. Grigsby,
to-wit:

Circuit Court of the United States for the Middle District of
Tennessee.

No. 3491. Equity.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

RUSSELL & BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY.

Cross-Bill.

Demurrer and Answer of A. H. Grigsby to the Cross-bill of R. L. Russell and Lillie Burchard, Administrators of John C. Burchard, Deceased.

Demurrer.

1. The said defendant demurs to so much of and such part of the said cross-bill as alleges the assignment to this defendant of the policy of insurance mentioned therein to be void for the following reasons:

"At the time of said alleged transfer and assignment of said policy to defendant Grigsby, said Grigsby did not then have, nor has he now, any insurable interest in the life of the deceased John C. Burchard. He was in no way related to said Burchard, nor was he a creditor of his, and that said assignment was void as a gambling and wagering contract."

And for the causes of demurrer to said part of the cross-bill defendant assigns the following:

First. The cross-bill shows that said policy of insurance was taken out by John C. Burchard on January 26, 1903, more than two years before its assignment to this defendant, that said policy was payable to the executors, administrators or assigns of the said John C. Burchard, and it was assigned to this defendant for a valuable consideration.

Second. The cross-bill shows that said policy of insurance, at the time of its assignment to this defendant, was a complete, subsisting and lawful contract and chose in action belonging to John C. Burchard and duly assignable by him as any other contract or chose in action; and its purchase by and assignment and transfer to this defendant was not void as a gambling or wagering contract.

18 II. And the said defendant demurs to so much and such part of said cross-bill as undertakes to allege that said policy of insurance, by its terms, was not assignable, namely, to the following paragraph of said cross-bill:

"Complainants state that by the terms and conditions of said policy of insurance it was provided that any claim against said insurance company arising under any assignment of said policy should

be subject to proof of interest and that no assignment would impose any obligation on the company until it had received the original or a duplicate thereof, and that the company did not guarantee the sufficiency or validity of any assignment."

"Complainants charge that by such term- of said contract it was understood and meant that the same was not assignable except to such person as under the law might have an assurable interest in the life of said intestate."

And for causes of demurrer to said paragraph, defendant assigns the following:

First. The alleged terms of said policy do not mean that it was not assignable except to persons having an insurable interest in the life of the assured.

Second. The alleged terms of said policy were alone for the benefit and protection of the insurance company and the cross-bill, as well as the original bill of said insurance company which the cross-bill refers to and incorporates, shows that said insurance company waived them.

Third. The cross-bill, and the original bill of the insurance company incorporated therein, show that this assignment was made to this defendant on February —, 1905, that said insurance company had due notice and knowledge of the terms of the assignment, which was in writing, that it accepted payment of premiums from defendant, that defendant duly made proofs of death which were recognized as valid and proper by the insurance company, and that said insurance company was willing and was preparing to pay the amount of the policy to this defendant as assignee, when notified by cross-complainants that they claimed the same; and cross-complainants cannot urge any formal objection to the assignment which lay alone with the insurance company and which it has waived.

For the causes the said defendant demurs to the above-specified parts of the said cross-bill and prays the judgment of the honorable court whether he shall make any other or further answer to them.

PITTS & McCONNICA,
KNIGHT & BEASELY,
Solicitors for Defendant.

19 I certify that in my opinion the foregoing demurrer is well made in point of law; and the defendant being absent, I state on oath that said demurrer is not interposed for delay.

JNO. A. PITTS,
Of Counsel for Defendant.

John A. Pitts, who subscribed above statement in my presence makes oath before me that the foregoing demurrer is not interposed for delay.

This May 14, 1907.

[SEAL.]

C. R. COCKLE,
Notary Public for Davidson County, Tennessee.

Answer.

And now the said defendant, A. H. Grigsby, without waiving his said demurrer, but relying thereupon, for answer to so much and such parts of the said cross-bill of R. L. Russell and Lillie Burchard, administrators as are not demurred to and as he is advised it is necessary for or proper to be answered unto, says:

The opening paragraphs of the cross-bill, relating to the taking out of the policy by John C. Burchard, the amount thereof, the premiums thereon, the death of assured, and the filing of the bill of interpleader by the insurance company and the answers thereto, are admitted.

Defendant refers to the files and former proceedings in this case for the details thereof, without undertaking to repeat them here.

Further answering on this branch of the case, defendant says that he himself made and submitted the proofs of the death of assured to the said insurance company, and was daily expecting payment when the said company filed its bill of interpleader in this cause neither of the cross-complainants giving any attention to whatever to the matter, nor asserting to him or giving him any notice of any claim on their part to said policy or its proceeds.

Defendant admits that four annual premiums were paid on said policy, the first two by the assured, the last two by this defendant. Said policy is in his possession and has been continuously since its assignment to him and he will file the same and the original assignment as evidence. Said assignment was in writing and was prepared by John H. Claggett, a lawyer of Centreville, at the instance and request of John C. Burchard, the assured, in duplicate, one of the duplicate originals being promptly sent to the insurance company. It is in the following words:

20 "In consideration of the sum of one hundred dollars (\$100.00) paid to me, the receipt of which is acknowledged, and the further consideration of the payment to the company of the premium upon the live insurance policy hereinafter mentioned, I, John C. Burchard, insured as John Cook Burchard, do hereby assign, transfer and convey to A. H. Grigsby my life insurance policy in the Penn Mutual Insurance Company, of Philadelphia, for ten thousand dollars (\$10,000.00), No. 230,176, of date January 26, 1903, together with all the legal rights and interest I have in the same, and all the benefits, interest and right, accruing by virtue of same.

"To have and to hold unto the said A. H. Grigsby absolutely, and I hereby authorize the life insurance company to pay to the said A. H. Grigsby the said sum insured, at my death, upon the conditions mentioned in said policy. Executed in duplicate, this the — day of February, 1905.

(Signed)

JOHN BURCHARD."

About the time of its execution, or very soon afterwards, to-wit, on the 16th day of February, 1905, the duplicate retained by de-

defendant was duly acknowledged by said Burchard before a notary public of Hickman county; and it may be both were acknowledged—as to this defendant does not remember definitely. The assignment was executed either on the 15th or 16th of February, 1905.

Defendant denies that he caused and procured or unduly or otherwise influenced the said John C. Burchard to assign said policy to him. On the contrary he was urged and importuned by said Burchard to purchase same; he at first refused outright to consider the purchase at all, on the next day he was urged and importuned again to purchase it, the said Burchard exhibiting the policy to him, and saying that unless defendant would purchase it and pay the premium then due it would be forfeited and lapsed, as he, Burchard, could not pay the premium, and offering it to defendant for \$100. On its face, the policy then appeared to be forfeited for non-payment of the premium due January 26, 1905. There was no provision in or on the policy for any extension or grace beyond the pay day stated on its face, which was January 26th. Only two premiums had been paid and there was no non-forfeiture clause or provision for any sort of extension until after three premiums had been paid that defendant could discover in or on the policy. The said Burchard claimed that he had some sort of agreement or understanding with the company whereby the past due premium could

21 yet be paid and the life of the policy saved and urged defendant to purchase it and pay him \$100 for it—suggesting that he could communicate with Mr. Lamar, the agent at Nashville and confirm his statement that the premium would then be accepted; also urging his necessity for the \$100 and defendant's financial ability to carry the policy without strain or inconvenience. Said Burchard was a young man, unmarried, and apparently in good health, with a prospect of many years of life and did not desire to purchase the policy. Finally, at the earnest and persistent entreaty of Burchard he did agree to purchase the policy, if the agent would confirm the statement of Burchard that the premium could then be paid and the policy preserved. Defendant called Mr. Lamar over the telephone and he did confirm Burchard's statement. Thereupon defendant at once sent to Lamar a check for the premium and paid Burchard the \$100 and Burchard went off and got a lawyer to draw the transfer or assignment, defendant not even being present or consulting the lawyer at all. Defendant afterwards paid the premium maturing January 26, 1906, all these payments being made by defendant with his own money and on his own account. The policy and the assignment were delivered to him when the assignment was made and he has had them ever since.

All statements in the cross-bill to the effect that defendant caused, procured, or influenced said Burchard to make said assignment or in any way deceived, defrauded or imposed on said Burchard in the transaction, are entirely without foundation in truth.

It is equally untrue that said Burchard was demented, or of unsound mind, or was incapable of attending to his business intelligently. On the contrary, he was an uncommonly intelligent

and bright man. It is quite true he had overtraded himself and been unfortunate in his investments. His investments were not speculative, but in form of expensive improvements of real estate in Centreville. He had built expensive brick houses in Centreville, going in debt for much of their cost and relying on certain arrangements for rental income, as defendant is informed, in which arrangements he was disappointed. He postponed the catastrophe by giving mortgages and in other ways, finally getting into litigation with his creditors and losing all he had; so that, when he approached defendant to sell him the policy in suit, he had lost all he had, was without credit and practically penniless. He had special need for money, a small amount, for the purpose of defraying the expenses of surgical operation made necessary by an injury he had received

22 about a month before; and it was largely on account of this necessity that defendant finally consented to purchase his policy. He did come to Nashville, shortly after the sale of the policy, on the money defendant paid him, and defendant furnished him other moneys while he was at Nashville. As evidencing the order of his intelligence defendant exhibits hereto copies of 3 letters written by Burchard to defendant while at Nashville, two before, and one after, the operation (which was successful) marked as Exhibit A. The originals are in defendant's possession and will be produced in evidence.

Whether said Burchard, during his childhood, was subject to epileptic fits or not, defendant does not know; nor can defendant say, of his own knowledge whether he was afflicted with epilepsy in his later years. There is no reference in his application for this policy, or in his medical examination thereon to his ever having been afflicted with epilepsy and he did not die of that disease, but of pulmonary tuberculosis, contracted or at least developed, long after the assignment of the policy to defendant.

He did, occasionally, though at long intervals, as defendant is informed, have fainting spells, which he claimed were caused by indigestion; and it was in one of these that he received a burn which made necessary the operation before mentioned and the consequences of which he describes in his letters above exhibited. His mind was not, however, in any way affected, his fainting spells were not, as defendant is informed, epileptic fits and his relatives, the cross-complainants, cannot truthfully magnify them into any affection of his mind or reason.

Defendant denies the allegation that the policy in suit was taken out by Burchard with the understanding with his creditors that it was for their benefit or to secure their debts. It was never, so far as defendant knows, or is informed, pledged to any creditor or creditors, although said Burchard did try to use it with his creditors and to borrow money on it, but failed, as defendant is informed, for the simple reason that it was not considered of material value, in view of the age and health of assured and the burden of the yearly accruing premium.

Defendant denies that the consideration paid by him for said policy was inadequate.

And now having answered all parts of the cross-bill not demurred to defendant prays to be hence dismissed with his costs.

A. H. GRIGSBY, *Defendant*,
By JNO. A. PITTS, *Solicitor*.
PITTS & McCONNICO, *Solicitors*.
KNIGHT & BEASLEY, *Solicitors*.

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EXHIBIT A.

ST. THOMAS HOSPITAL,
NASHVILLE, TENN., Feb. 22, 1905.

Dr. A. H. Grigsby, Centreville, Tenn.

DEAR FRIEND GRIGSBY: I had firmly concluded to consult my friend Dr. Sifford about my trouble and with him have Dr. Eave make the examination. This I did; but was unable to have an examination until late Friday afternoon. After examination at Eave's office came out to the hospital to make arrangements for accommodation. I am comfortably situated.

Sifford and Eave say that there is nothing so very alarming in my case but that it will necessitate an operation. This operation will be the removing a portion of the upper table of the skull. They are now taking off the superfluous portion of the granulations as you suggested would have to be done before healing could be effected. This growth should never have been permitted. The bone is dead from long absence of any nourishment, natural or artificial. The periost-um having been removed nature had no means by which to nourish this part of the bone and no artificial means being provided, the bone perished. My doctors are healing all my other troubles and at the same time seeing how much of this bone they can revive before attempting the operation. This treatment previous to the operation will require some three weeks. My wound is doing nicely. Dr. Sifford comes out and dresses it promptly every morning at ten o'clock.

Having nothing further to write I will close. With kind respects to yourself and family, I am,

Yours sincerely,

JNO. BURCHARD.

EXHIBIT A.

(Postmarked, Nashville, Tenn., March 2, 1905.)

Dr. A. H. Grigsby, Centreville, Tenn.

DEAR FRIEND GRIGSBY: Your letter was gladly received some days since. Dr. Sifford remembers meeting you the night that he and Eave operated on Uncle Willie's head. Sifford says that if my trouble was doing any better I could not stand it. I will be ready for the operation in about ten days, or it may take two weeks. I am sorry to see so many deaths occurring in Hickman. I am in pleasant quarters and take outdoor exercise every day the weather

24 permits. This is making me feel much better. My color is getting back all right and my conditions in general are growing much better. As to how the operation will go with me, I cannot tell, but I am getting in the best of shape for it; and I have no dread. I am going to tell Eave and Sifford when they come to the operation that they are cutting on a good man and that good men are not to spare in this country.

Having no further news of interest to write I will close.

Yours fraternally,

JNO. BURCHARD.

EXHIBIT A.

3-31-'05.

DEAR FRIEND GRIGSBY: Your kind favor with check enclosed was received today. Herewith I enclose you my note for same. It goes without saying that I most cordially appreciate your favor in these days. I am gaining strength rapidly; have been able to go up town for the last two days. Think, perhaps, I will be able to come home to-morrow afternoon for a stay of two days. Do not let my people know this for I want to surprise them. I am writing them but am saying nothing about this trip home; so keep this quiet.

While up town day before yesterday, I saw H. E. Calkins, R. R. Jones, and several other out of town acquaintances. Will tell you all the news when I see you.

Thanking you again for your assistance, I am,

Your sincere friend,

JNO. BURCHARD.

Foregoing demurrer, answer and exhibits, endorsed: Filed June 13, 1907, H. M. Doak, Clerk.

The following order amending cross-bill was made and entered, to-wit:

Original Bill.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

RUSSELL & BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY.

Cross-bill.

Come the parties to the cross-bill by their attorneys and upon application of the complainants in the cross-bill, they are allowed to amend the same as follows:

On page 5 of said cross-bill near the bottom of the page after the words "and the company did not guarantee the sufficiency or the

validity of any assignment," insert the following words, "said contract of insurance so far as said insurance company was concerned was made and formally executed in the state of Pennsylvania where said company had its domicile, and nothing remained to be done except the delivery of the same, which delivery was made in the state of Tennessee, and by the terms of said policy the amount of said insurance was to be paid at the home office of said company in the city of Philadelphia, Penn., and the premiums due thereon from the insured were payable likewise at said home office of the company. And by the laws and public policy of said state of Pennsylvania an assignment of said policy to any person not having an insurable interest in the life of said party so insured is void as being against good morals and contrary to the public policy of said state and a gaming or wagering contract. And moreover by the laws of said state said insurance company was not allowed to pay nor the assignee to receive and hold the money due upon said contracts of insurance by virtue of any such assignment. So that complainants allege that by the terms of said contract it was provided to give effect to the laws of said state."

Enter this August 5, 1907.

CLARK, *Judge*.

The following replication to the answer to the cross-bill was filed, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

In Equity.

Original Bill.

PENN MUTUAL LIFE INSURANCE COMPANY
vs.

A. H. GRIGSBY et al.

and

RUSSELL & BURCHARD, Adm'rs,
vs.

A. H. GRIGSBY et al.

Cross-bill.

The replication of R. L. Russell and Lillie Burchard, administrator and administratrix of the estate of John C. Burchard, deceased, to the answer of A. H. Grigsby, filed to their cross-bill in this cause.

These repliants, saving and reserving unto themselves all manner of advantage and exceptions which may be had and taken to the

manifold errors, uncertainties and insufficiencies in the answer of the defendant, A. H. Grigsby, for replication thereto, say:

That they will and do aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by that said defendant; that the — said defendant is very uncertain, evasive and insufficient in law to be replied unto by these replicants.

26 They further state that it is not admitted but denied that said defendant A. H. Grigsby was daily expecting payment of said policy to him when the bill was filed in this case; it is untrue that the cross-complainants had not given any attention to the matter, nor notified him of their claims. On the contrary said defendant was notified of their claim as well as the insurance company.

It is denied that defendant was urged by intestate Burchard to purchase said policy.

It is denied that said policy was about to become forfeited and all such part of said answer relating thereto is denied.

It is denied that he was apparently in good health, but the condition of his health was as stated in the cross-bill in this case and this said defendant well knew, as defendant was a physician and treated said Burchard for the injuries received.

All other things in said answer contained material or effectual, not herein admitted or denied, are now denied, all of which matters and things these repliants are ready to aver, maintain and prove as this honorable court shall direct and humbly pray as in and by their said bill they have already prayed.

BATES & BATES,
GEO. T. HUGHES,
Solicitors for Replicants.

Endorsed: Filed September 2, 1907, H. M. Doak, Clerk.

The following opinion sustaining the demurrer was handed down and filed, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

Equity. No. 3491.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

Bill and Cross-bill.

In this case the able solicitors on either side make no question as to whether or not a demurrer of the kind here in question can be incorporated in an answer, or whether under the federal practice, as distinguished from the state practice, the grounds of said demurrer are only available under an independent demurrer filed in due time,

raising such question; nor is any question made by the cross-bill complainants on the right of the cross-bill defendant to call up and have the court rule upon such a demurrer as this separately and in advance of a hearing on the merits, although it is certain that it has not been the practice of this court to do so, and in this way have two hearings of the case instead of one. It is probable that the court should decline to entertain and to act upon the demurrer when incorporated in the answer, upon the ground that there exists no right to call it up in advance of a full hearing on the merits; but, as just stated, as the solicitors make no point on the question, I have concluded to make ruling upon the demurrer found in the cross-bill answer, and I conclude that the demurrer is well taken and that it must be sustained, and it is accordingly so ordered, and such an order may be made and entered as meets the effect of this ruling. There seems to be no objection to the motion made in this case for an order sustaining the bill as an interpleader, authorizing the payment of the money into court and other provisions set out in the motion, and the proper order in that respect will be made and entered.

I find in the case what is named as a review of United States Supreme Court decisions by defendant Grigsby, filed with the clerk October 10, 1907, but I have not been able to consider this paper because it is not signed by any solicitor in the case and this court is not authorized to consider and under its practice never does consider a paper not duly signed by solicitors in the case.

This is all that this case now calls for at the hands of the court, as the court understands it.

CLARK, J.

Endorsed: Filed November 2, 1907, H. M. Doak, Clerk.

The following order was made and entered sustaining the demurrer, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

No. 3491.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

Original Bill.

R. L. RUSSELL & LILLIE BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY et al.

Cross-bill.

In this cause after argument upon the demurrer of A. H. Grigsby to the cross-bill of Russell and Burchard, administrators, and due

consideration thereof, it is ordered by the court that said demurrer be and it is sustained and that the said cross-bill as to those portions thereof covered by the demurrer be dismissed. The complainants

28 R. L. Russell and Lillie Burchard, administrators of John Burchard, deceased, in the cross-bill against A. H. Grigsby, except to the ruling and judgment of the court in sustaining the demurrer of said Grigsby to the portion of said cross-bill covered by said demurrer.

Enter this December 28, 1907.

CLARK, J.

The following stipulation of counsel was filed, to-wit:

Circuit Court of the United States for the Middle District of
Tennessee.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

Original Bill.

RUSSELL & BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY et al.

Cross-bill.

In this case, in order to save the expense of taking depositions, the following facts are admitted:

That the policy which is the foundation of this suit was assigned by the insured John C. Burchard to defendant A. H. Grigsby on or about the 15th or 16th of February, 1905, the said Burchard having paid the first and second premiums, due January, 1903, and January, 1904; that the assignment was prepared by an attorney of said Burchard and at said Burchard's instance and was in the form set out in the answer of the defendant Grigsby in this case and the original, with the certificate of acknowledgement thereon is hereto attached, marked A.

That the assignment of said policy to defendant Grigsby was made under following circumstances:

Defendant Grigsby was approached by the assured, Burchard, to sell him the policy. Burchard exhibited the policy to him and offered it for \$100. On its face, the policy appeared to be then forfeited for non-payment of the premium due January 26, 1905, there being in or on the policy no provision for any grace or extension beyond the day of payment, nor any non-forfeiture clause or provision for any sort of extension until after three premiums had

been paid, which defendant could discover. Burchard claimed that he had some sort of agreement or understanding with the company whereby the past-due premium could yet be paid and the life of the policy saved, and suggested to defendant that he could communicate with Mr. Lamar, the agent at Nashville, and confirm his statement that the premium would then be accepted. Burchard was then a young man, unmarried, and apparently in good health, except the injury referred to below. Defendant agreed to purchase the 29 policy if the agent would confirm the statement of Burchard that the premium could then be paid and the policy preserved. Defendant then communicated by telephone with the agent, Lamar, who confirmed Burchard's statement. Thereupon defendant at once sent his check to Lamar for the premium and paid Burchard \$100 and Burchard went off and got a lawyer to prepare the assignment, defendant not being present or consulting the lawyer. The assignment was executed in duplicate, one being sent to the company and the other retained by the defendant. The policy was immediately delivered to defendant and thereafter kept by him as his own property and he paid to the company the premium due in January, 1906—all these payments being made by defendant out of his own money and on his own account.

Burchard was an intelligent and bright man, but had over-traded himself in business and been unfortunate in his investment. His investments were in the form of expensive improvements on real estate in Centreville, where he had built expensive brick houses, going in debt for much of their cost and relying upon certain arrangements for rental income, in which he was disappointed. He had given mortgages upon his property and was involved in litigation with his creditors and at the time he approached defendant to sell the policy in question, he had lost all he had, was without credit and practically penniless, and his estate insolvent. He had special need for money to defray the expenses of a surgical operation made necessary by a burn he had received about a month before by falling in a fainting spell with his head in the fire, described in his letters to defendant, copies of which are attached to defendant's answer. He came to Nashville for the purpose of having the operation performed, shortly after the sale of the policy and used for that purpose the money paid him by defendant for the policy and defendant furnished him other money while in Nashville, and the operation was performed.

Burchard did not die from the effects of the injury above mentioned, but from pulmonary tuberculosis which was contracted or at least developed after the assignment of the policy to defendant.

It is admitted that the copy hereto attached and marked B, of the policy No. 230176 for \$10,000, is a true copy of the original mentioned in the pleadings and may be read in evidence, the original having been by consent of parties surrendered to the company on its payment into court of the proceeds; also that 30 the letters of J. C. Burchard to defendant Grigsby hereto attached and marked C. D. and E. are the originals of the

copies attached to defendant's answer, and are in the handwriting of the said Burchard.

BATES & BATES,
GEO. T. HUGHES,
Solicitors for Cross-Complainants.
PITTS & McCONNICO,
KNIGHT & BEASELY,
Solicitors for Cross-Defendant.

Endorsed: Filed April 21, 1908. H. M. Doak, Clerk.

The following is exhibit A to the stipulation foregoing to-wit:

In consideration of the sum of one hundred dollars (\$100.00) paid to me, the receipt of which is acknowledged and the further consideration of the payment to the company of the premium upon the life insurance policy hereinafter mentioned, now due and payable, as well as the payment of the premiums hereafter to accrue upon said policy, I, John C. Burchard, insured as John Cook Burchard, do hereby assign, transfer and convey to A. H. Grigsby my life insurance policy in the Penn Mutual Life Insurance Company of Philadelphia, for ten thousand dollars (\$10,000.00), No. 230176, of date January 26, 1903, together with all the legal rights and interest I have in the same and all the benefit, interest and right accruing by virtue of same.

To have and to hold unto the said A. H. Grigsby absolutely and I hereby authorize said Life Insurance Company to pay to the said A. H. Grigsby the said sum insured at my death upon the conditions mentioned in said policy. Executed in duplicate this the — day of February, 1905.

JOHN BURCHARD.

STATE OF TENNESSEE,
Hickman County:

Personally appeared before me, J. H. Patterson, a notary public in and for said county, the within named John Burchard, the bargainer, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained. And — — — wife of the said — — —, having personally appeared before me, privately and apart from — husband—, the said — — —, acknowledged the execution of said — — — to have been done by — — — freely, voluntarily,
31 and understandingly without compulsion or restraint from — — — said husband—, and for the purposes therein expressed.

Witness my hand and official seal at Centreville, Tennessee, this 16th day of February, 1905.

[SEAL.]

J. H. PATTERSON,
Notary Public.

Endorsed: Filed April 21, 1908. H. M. Doak, Clerk.

The following is exhibit B to said stipulation, the policy to-wit:

Number	The Penn Mutual (Vignette)	Amount,
230176.	Life Insurance Company of Philadelphia.	\$10,000.00

In consideration of the application for this policy, hereby made a part of this contract, the Penn Mutual Life Insurance Company of Philadelphia insures the life of John Cook Burchard of Centreville in the county of Hickman, state of Tennessee, in the sum of ten thousand dollars and promise to pay at its home office, in the city of Philadelphia, unto his executors, administrators, or assigns, the said sum insured, upon receipt of satisfactory proof of the death of the insured, during the continuance in force of this policy, upon the following conditions, namely:

The payment in advance to the company, at its home office, of the sum of two hundred and twenty-five 40-100 dollars, at the date hereof, and of the annual premium of two hundred and twenty-five 40-100 dollars, at or before three o'clock, p. m., on the twenty-sixth day of January in every year during the life of the insured.

This policy shall participate annually in the surplus earnings of the company in accordance with the regulations adopted by the board of trustees.

The extended insurance, paid-up insurance, and loan or cash surrender value privileges, benefits and conditions stated on the second page hereof form a part of this contract as fully as if recited at length over the signatures hereto affixed.

In witness whereof the Penn Mutual Life Insurance Company of Philadelphia has caused this policy to be signed by its president, secretary and actuary, attested by its registrar, at its home office, in Philadelphia, Pennsylvania, the twenty-sixth day of January, 1903.

HENRY C. BROWN, *Secretary.*

HENRY WEST, *President.*

JESSE J. BARKER, *Actuary.*

Attest:

(Signed) A. G. GREENEM, *Registrar.*

32 The following words and figures appear in the blank margin of the foregoing copy of policy, to-wit:

Age, 28. Sum insured, \$10,000. Yearly premiums, \$225.40. Cash premiums, annually, \$158.40. Annual loan, \$67.00. Less surplus. I hereby certify that this is a true copy of the original policy No. 230176, the death claim under which has been settled by the company.

HARRISON S. GILES,
Supervisor.

Ordinary Life Policy. Examined by,
J. J. B., O. L., A. D.

Policy Form No. 1, Edition 5, 1902.

The following is the second page of said copy policy, to-wit:

Guaranteed Privileges, Benefits and Conditions.

I. Unrestricted as to travel, residence and occupation. From the date of issue this policy shall be without any restrictions as to travel, residence and occupation.

II. Incontestability. This contract shall be absolutely incontestable for any cause after one year from date of issue, except non-payment of premium; but in case of suicide, whether sane or insane, within one year from the date of this policy, the liability of the company shall be limited to the amount of the premium paid hereon.

III. Payment of Premiums. This policy does not take effect until the first premium shall actually have been paid during the good health of the insured. All premiums are due and payable at the home office of the company in the city of Philadelphia, but they may be paid to agents on or before the dates when due in exchange for receipts signed by the president, vice-president, secretary, treasurer, or actuary. If not paid when due, the policy shall be null and void, subject, however, to the company's non-forfeiture system as endorsed hereon with accompanying table. From any sum payable under this policy there shall be deducted the unpaid portion of the year's premium, if any, and any indebtedness to the company on account of this contract.

IV. Age. Any error in stating the age of the insured will be adjusted by the company paying such amount as the premium actually paid would purchase at the table rate at the correct age.

V. Proofs of Death. Proofs of death shall be furnished within six months after the ascertained death of the insured, and in the form prescribed by the company.

VI. Assignment. Any assignment of this policy shall be attached hereto, and a duplicate thereof shall be furnished the company. Any claim against the company arising under any

33 assignment of this policy shall be subject to proof of interest.

No assignment shall impose any obligation on this company until it has received the original or a duplicate thereof, nor does the company guarantee the sufficiency or validity of any assignment.

VII. Re-Instatement. Should the policy lapse for non-payment of premium, it may at any time, with the approval of the officers be re-instated upon the insured furnishing satisfactory evidence of good health and the payment of past-due premiums and any indebtedness with legal interest thereon.

VIII. Pursuant to law a copy of the application for this policy is attached hereto. No alteration of this contract or waiver of any of its conditions shall be valid unless made in writing and signed by an officer of the company.

IX. Non-Forfeiture Provisions. If this policy shall lapse through non-payment of premiums, after three years' premiums have been paid in cash, the company, subject to the other conditions of the policy, will guarantee the following options:

First. Will extend automatically, without participation, the amount insured by this policy, for the number of years and days named; or

Second. Will grant paid up non-participating insurance payable at death for the sum provided for, upon written application by the owner of the policy and the legal surrender of all claims hereunder to the company at its home office, within thirty days after such lapse; or

Third. Will pay the stated cash surrender value provided for, on surrender as aforesaid within thirty days from the date of lapse.

X. Loan Value. At any time after three years' premiums have been paid in cash, while the policy is in force by payment of premiums, the company will lend thereon upon satisfactory assignment as collateral security, the sum provided for in the table of values given below. No loans will be made for a less sum than fifty dollars, and only in multiples of five dollars, and they shall be diminished by any indebtedness outstanding against the policy.

Table of Extension, Paid-up, and Loan or Cash Values Provided for by the Policy, if No Indebtedness Exists Against It.

34

At end of year.	Term of extension for this policy.	These values are for \$1,000 insurance. For this policy multiply by ten.	
		Paid up insurance on surrender.	Loan or cash surrender value.
3rd	3 years 43 days	76	10.45
4th	4 years 88 days	101	23.53
5th	5 years 144 days	126	37.03
6th	6 years 208 days	152	50.97
7th	7 years 274 days	176	65.33
8th	8 years 338 days	201	80.12
9th	10 years 26 days	226	95.38
10th	11 years 54 days	250	111.11
11th	12 years 41 days	275	124.08
12th	12 years 354 days	299	137.40
13th	13 years 259 days	322	151.08
14th	14 years 124 days	346	165.13
15th	14 years 313 days	369	179.54
16th	15 years 101 days	392	194.32
17th	15 years 220 days	415	209.47
18th	15 years 308 days	437	224.97
19th	16 years 4 days	459	240.81
20th	16 years 39 days	480	256.99

Should any indebtedness exist it shall be deducted from the cash value of the policy, and the other values shall be diminished proportionately.

The following is the third page of the copy of policy, to-wit:

Edition December, 1901.

Copy of Application for Insurance in The Penn Mutual Life Insurance Company.

Home Office: Nos. 921, 923, and 925 Chestnut Street, Philadelphia, Penn.

1. Give your name in full and both residence and business address. (Give street, number, town, county, and state.) A. John Cook Burchard. Residence address: Centreville, Hickman, Tenn. Business address: No. street, town, county, state.

B. If a married woman, state maiden name and husband's name.

B. Maiden name — husband's name.

C. How long have you resided at your present address?

C. 3 years.

D. What have been your places of residence during the past five years?

D. Centreville and Franklin, Tennessee.

35 E. Do you intend to change your residence or to travel other than within the limits of the temperate zone?

E. No.

2. A. Present occupation? (State kind business.)

A. Merchant and real estate dealer. Previous occupation, farmer.

B. Do you intend making any change, temporary or permanent in your occupation, if so explain fully.

B. No.

3. A. Give the name and post office address of the person for whose benefit the insurance is proposed.

A. My estate. If the said beneficiary out lives me, otherwise to my estate.

B. State the relationship of the person to you.

C. If a married woman, state maiden name and husband's name.

C. Maiden name — husband's name.

4. Give the place of your birth and date?

Born at Only County, Hickman, Tennessee, on the 19 day of November, 1874, age nearest birthday, 28.

5. Are you married, single, widower or widow?

Single.

6. A. State as far as you know the following particulars in regard to your grandparents, parents, brothers and sisters?

Father's father, Age if living — State of health — Age, death 80. Cause of death, old age. How long ill —. Previous health, good.

Father's mother. Age if living —. State of health —. Age, death, 68. Cause of death, pneumonia. How long ill, 3 weeks. Previous health, good.

Mother's father. Age if living —. State of health —. Age, death, 71. Cause of death, —. How long ill —. Previous health, good.

Mother's mother. Age if living, —. State of health —. Age, death, 70. Cause of death, pneumonia. How long ill, 2 weeks. Previous health, good.

Father. Age if living, 60. State of health, good. Age, death —. Cause of death, —. How long ill, —. Previous health, good.

Mother. Age if living —. State of health, —. Age, death, 34. Cause of death, Female trouble with pneumonia complications. How long ill, 8 months. Previous health, good.

B. How many full brothers have you had —. Total —. 36 Living —. Ages —. Present and past health —. Dead —. Ages —. What did they die of —. How long sick —.

C. How many sisters, 4. Living 3. Ages, 32, 27, 25. Present and past health, good. Dead, 1. Age, 8 days. What did it die of, premature birth.

7. A. Have you your life insured in this or any other company? (If so give the name of each company and the kind and amount of each policy.)

B. Have you ever applied to any company or agent for insurance without receiving a policy of the exact kind and amount applied for?

C. Are any negotiations for insurance now pending? (If so state full particulars.)

7. A. 10 p. Life Union Central, 3,000 20 P. L. N. U. Life \$2,000, \$3,000 when about 20, among strangers and ignorant of men.

B. No, except family record applied for policy in Metropolitan Life and rejected.

C. No, except, none.

8. Sum to be insured, \$10,000. Kind of policy, ordinary life. How is the premium to be paid? Annually, 30 per cent. loan.

How is the surplus to be used, reduce and when available, subject to the control of the payer of the premium.

I hereby warrant and agree that I am temperate in my habits, am now in good health and ordinarily have good health, and that — my statements and answers in this application and to the medical examiner no information has been withheld touching my past and present state of health and habits of life, and present and prospective occupations, employments and residence, with which the Penn Mutual Life Insurance Company should be made acquainted; and that the statements and answers to the printed questions above, together with this declaration, as well as those made to the company's medical examiner, shall constitute the application and be the basis of this contract. It is also understood and agreed on behalf of myself and of any beneficiary under any policy issued by the said company on my life, that the company shall incur no liability until this application has been received, approved, the policy issued thereon by the company and delivered and paid for during my lifetime and good health; and that the policy applied for shall be in form now used by the company; and that the place of contract shall be the city of Philadelphia, state of Pennsylvania.

37 In witness whereof, the applicant has hereunto subscribed his name. Dated at Centreville, the 15th day of January, 1903.

Witness present:

(Sign.)

WM. A. EDWARDS.

(Sign.)

Signature of the person proposed for insurance. Sign the names in full.

(Sign.)

JNO. COOK BURCHARD.

(Sign.)

Questions to be Answered by the Person to be Insured.

Name of applicant, John Cook Burchard, examined this 15th day of January, 1903, at Centreville, county of Hickman, state of Tennessee.

What is the date of your birth?

19 November, 1874.

Do you contemplate any change of residence or occupation?

No.

8. Are you now in good health?

A. Yes.

Have you been successfully vaccinated?

B. Yes.

*9. A. How long since you were attended by a physician or professionally consulted one?

*A. Some years ago.

B. For what disease?

B. Bilious attack.

C. Give the name and residence of such physician.

C. R. P. Wilson, Centreville, Tennessee.

D. Give the name of your medical adviser or family physician, to whom you now refer for a certificate if deemed necessary?

D. R. P. Wilson, Centreville, Tennessee.

E. Has any medical examiner given an unfavorable opinion of your physical condition with reference to life insurance?

E. None except stated in application.

F. Have you ever been advised by a physician to try a change of climate to benefit your health?

F. No.

10. A. Have you hernia, or have you ever been ruptured?

A. No.

B. If so, do you now wear a suitable truss?

B.

38 C. Do you agree to wear one while insured in this company?

C.

11. A. Do you now use intoxicating liquors?

A. None.

B. To what extent?

B.

C. Have you always been temperate in their use? (If not explain the duration and extent of excess, and when last?)

C. Am total abstainer.

12. A. Have you ever used opium, morphia, chloral, or any narcotic, unless regularly prescribed by a physician? (If so, explain fully).

A. No.

13. A. Have you had insanity, apoplexy, palsy, vertigo, convulsion, sunstroke, congestion, inflammation, or any other disorder of the brain or nervous system?

A. None except. None.

B. Have you had asthma, consumption, spitting of blood, habitual cough and expectoration, palpitation, or any disease of the throat, heart or lungs?

B. None except. None.

C. Have you ever had cancer or any tumor, chronic diarrhea, discharge from the ear, dropsy, fistula, gall-stone, or gravel, open sores, inflammatory rheumatism, gout, syphilis or stricture or any disease of the liver, kidneys, or bladder?

C. None except. None.

D. Have you had any defect of hearing or eyesight, any malformation or varicose veins?

D. None except. None.

14. Have you had any illness or disease other than as stated by you above? (If so state full particulars.)

None except. No.

Give here particulars as to date, duration, severity, etc., of each disease you have had.

*Explain fully 9, A. and B.

Nothing more than stated.

It is hereby agreed: That all the foregoing statements and answers, made to the company's medical examiner, are warranted to be true, and are offered to the company as a consideration of the contract.

Witness- by the examiner, A. Norris.

Signature of the person to be insured.

JOHN COOK BURCHARD.

39 The foregoing policy is endorsed as follows, to-wit:
No. 230176. (Medal-ion). The Penn Mutual Life Insurance Company, office 921, 923, 925, Chestnut street, Philadelphia. Name of the insured, John C. Burchard. Date of policy, January 26, 1903. Amount, \$10,000. Term of life. Yearly payment, \$225.40. Payable annually. Due the 26 day of January. O. L. policy. Form No. 1. A. D. Ed. 5, 1902.

And further endorsed in writing as follows, to-wit:

It is agreed that this is a true copy of the original and may be used in place of the original, which has been returned to the insurance company at its request.

PITTS & McCONNICO,
Attorneys for Grigsby, Assignee.
GEO. T. HUGHES,

Attorney for Administrator of Assured.

The following letters were filed as exhibits to the foregoing stipulation, to-wit:

C. Envelope with heading: "John Burchard, real estate, phosphate iron, farm and timber lands, bought and sold, Centreville, Tennessee." Postoffice mark: "Nashville Tennessee, February 23, 11:30 A. M., 1905." Addressed: "Dr. A. H. Grigsby, Centreville, Tenn."

ST. THOMAS HOSPITAL,
NASHVILLE, TENN., *February 22, 1905.*

Dr. A. H. Grigsby, Centreville, Tenn.

DEAR FRIEND GRIGSBY: I had firmly concluded to consult my friend Dr. Sifford about my troubles and with him have Dr. Eve make the examination. This I did but was unable to have an examination until late Friday afternoon. After examination at Eve's office came out to the hospital to make arrangements for accommodations. I am comfortably situated.

Sifford and Eve say that there is nothing so very alarming in my case, but that it will necessitate an operation. This operation will be the removing a portion of the upper table of the skull. They are now taking off the superfluous portion of the granulations, as you suggested would have to be done before healing could be effected. This growth should never have been permitted. The bone is dead from long absence of any nourishment, natural or artificial. The periosteum having been removed nature had no means by which to nourish this part of the bone and no artificial means being provided the bone perished. My doctors are healing
40 all, my other troubles and at the same time seeing how much of this bone they can revive before attempting the operation. This treatment previous to the operation will require some three weeks. My wound is doing nicely. Dr. Sifford comes out and dresses it promptly every morning at ten o'clock.

Having nothing further to write I will close with kind respects for yourself and family, I am.

Yours sincerely,

JOHN BURCHARD.

D. Envelope with heading, printed: "John Burchard, real estate, phosphate, iron, farm and timber lands, bought and sold, Centreville, Tenn. Postmarked: "Nashville, Tenn. Mar. 2, 1905, 4:30 P. M." Addressed: "Dr. A. H. Grigsby, Centreville, Tenn."

MARCH 2, 1905.

Dr. A. H. Grigsby, Centreville, Tenn.

DEAR FRIEND GRIGSBY: Your letter was gladly received some days since. Dr. Sifford remembers meeting you the night that he and Eve operated on Uncle Willie's head. Sifford says that if my trouble was doing any better I could not stand it. I will be ready for the operation in about ten days, or it may be two weeks. I am sorry to see so many deaths occurring in Hickman. I am in pleas-

ant quarters and take out door exercise every day the weather will permit. This is making me feel much better. My color is getting back all right and my conditions in general are growing much better. As to how the operation will go with me I cannot tell, but I am getting in the best of shape for it; and I have no dread. I am going to tell Eve and Sifford when they come to the operation that they are cutting a good man and that good men are not to spare in this country.

Having no further news of interest so I will close.

Yours fraternally,

JNO. BURCHARD.

E. Envelope, headed: "John Burchard, real estate, phosphate, iron, farm and timber lands, bought and sold, Centreville, Tenn." Postmarked: "Nashville, Tenn., March 31, 10 P. M., 1905."

3-31-'05.

DEAR FRIEND GRIGSBY: Your kind favor with check enclosed was received today. Herewith I enclose you my note for same. It goes without saying that I most cordially appreciate your favor in these days. I am gaining strength rapidly; have been able to go up town for the last two days. Think, perhaps, I will be able to come home to-morrow afternoon for a stay of five days. Do not let my people know this, for I want to surprise them. I am writing them but am saying nothing about this trip home, so keep this quiet.

While up in town day before yesterday, I saw H. E. Calkins, R. R. Jones, and several other out of town acquaintances. Will tell you all the news when I see you.

Thanking you again for your assistance, I am

Your sincere friend,

JNO. BURCHARD.

Endorsed: Filed April 21, 1908, H. M. Doak, Clerk.

The following three premium receipts were filed, to-wit:

No. 180.

Total annual premium.....	\$225.40
Less note	67.00
Net Cash	\$158.40

Note statement.

Amount of note at last settlement.....	\$164.04
Add note of 1906.....	67.00
Total.....	\$231.04

Surplus of 1906.....	\$29.50
Less int. on note at this settlement.....	\$12.86

Deduct balance of surplus from above amount.....	\$ 16.64
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Amount of note at this settlement.....	\$214.40
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Premium as received this 13th day of January, 1906. By A. W. Lamar, agent.

The Penn Mutual Life Insurance Company of Philadelphia, received as per margin from the owner of policy No. 230176, insuring the life of John C. Burchard the annual premium on said policy due the 26th day of January, 1906.

This receipt must be countersigned by A. W. Lamar, agent at Nashville, Tennessee.

WM. H. KINGSLEY,
Secretary and Treasurer.

No. 180.

Total annual premium.....	\$225.40
Less note	67.00
Net Cash	\$158.40

Note statement.

Amount of note at last settlement.....	\$116.30
42 Add note of 1905.....	67.00
Total.....	\$183.30

Surplus of 1905.....	\$29.10
Less int. on note at this settlement.....	\$ 9.84
Deduct balance of surplus from above amount.....	\$ 19.26

Amount of note at this settlement.....	\$164.04
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Premium as above received this 27th day of February, 1905. By A. W. Lamar, agent.

The Penn Mutual Life Insurance Company of Philadelphia, received as per margin from the owner of policy No. 230176, insuring the life of John C. Burchard the annual premium on said policy due the 26th day of January, 1904.

This receipt must be countersigned by A. W. Lamar, agent at Nashville, Tennessee.

WM. H. KINGSLEY,
Secretary and Treasurer.

No. 180.

Total annual premium.....	\$225.40
Less note	67.00
Net Cash	\$158.40

Note statement.

Amount note at last settlement.....	\$ 71.02
Add note of 1904.....	67.00
Total.....	\$138.02

Surplus of 1904.....	\$28.70
Less int. on note at this settlement.....	\$ 6.98
Deduct balance surplus from above amount.....	\$ 21.72

Amount of note at this settlement.....	\$116.30
--	----------

Premium as above received this 27th day of February, 1904. By A. W. Lamar agent.

The Penn Mutual Life Insurance Company of Philadelphia, received as per margin from the owner of policy No. 230176, insuring the life of John C. Burchard the annual premium on said policy due the 26th day of January, 1904.

This receipt must be countersigned by A. W. Lamar, agent at Nashville, Tennessee.

WM. H. KINGSLEY,
Secretary and Treasurer.

Thereupon the cause came on to be heard before the Hon. John E. McCall, judge of the District Court for the western District of Tennessee, sitting by designation, when the following further proceedings were had, to-wit:

After the hearing and argument of the cause, an opinion was handed down and filed, as follows, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

Equity.

PENN MUTUAL LIFE INSURANCE COMPANY
vs.

A. H. GRIGSBY et al.

Original Bill.

RUSSELL & BURCHARD, Adm'ts,
vs.

A. H. GRIGSBY et al.

Cross-Bill.

The original bill in this case was filed by the Penn Mutual Life Insurance Company against A. H. Grigsby, R. L. Russell and Lillie Burchard.

The last two defendants are the administrators of John C. Burchard, deceased.

The bill was in the nature of an interpleader and was filed by the company against these several defendants for the purpose of having the court decide whether a life insurance policy should be paid to the administrators of John C. Burchard, deceased, or to the assignee of the policy, A. H. Grigsby.

An order was entered sustaining the bill as an interpleader, authorizing the payment of the amount of the policy into the court, and this has been done.

The question now before the court is whether or not the amount of the policy should be paid to the administrators of the assured, or to the assignee of the policy.

It appears that on January 26, 1903, the complainant issued to Jno. C. Burchard, now deceased, a policy on his life for ten thousand dollars, that four annual premiums were paid, which carried the policy in force to January 26, 1907. The policy was written payable to the estate of the assured which was on February 10, 1905, in writing assigned by the assured to the defendant, A. H. Grigsby, for a consideration of one hundred dollars and the further consideration of the payment to the company of the premium upon the life insurance policy then due and payable, as well as the payment of the premiums thereafter to accrue upon said policy.

On the 13th of December, 1906, the assured, John C. Burchard, died.

There is an agreed statement of facts filed. It is contended by the administrators that the assignment of the policy was and
44 is a wagering or gambling contract and is voidable, and therefore, the assignee is only entitled to be paid out of the policy the amount of money he paid the assured, plus the amount of the premiums which the assignee paid on the policy, with interest.

Without setting out in full the agreed statement of facts, I think it sufficient to state that I feel warranted thereunder to hold that the assignment is valid and that A. H. Grigsby, the assignee of the policy, is entitled to receive the amount of the policy in question.

The contract of insurance between the insurance company and the assured was entered into in good faith and was a valid contract. At the time of the issuance of the policy, there is nothing in the record to indicate that the assured ever contemplated assigning it to any one. After he had paid the first two premiums he found himself broken down in health and in finances. It appears that he was in great need of a few dollars to secure certain medical or surgical attention that his physical condition greatly demanded. That his policy at that time had no cash surrender value for the reason that by its terms it had no cash value until the payment of three full premiums and he had no means with which to pay the third premium that appears to have been past due at the time of the assignment of the policy. In this condition of affairs the assured went to his friend A. H. Grigsby and proposed to sell him the policy for a hundred dollars, fully acquainting Grigsby with the circumstances in which he found himself. After Grigsby learned that the policy had not lapsed, or rather, after informing himself that the third premium could yet be paid, though past due, and thus be saved from lapsing, paid the third premium on the policy, paid the assured a hundred dollars in cash and took the written assignment of the policy. The policy was the property of the assured. It was all he had with which to raise the money to pay for the surgical attention which his condition imperatively demanded. The assignee bought this property from his friend at his friend's solicitation and insistence. It appears to me that he bought it in good faith, that it was an out purchase for a fair consideration as conditions then appeared. The consideration paid for the policy was used by the assured in procuring surgical attention which brought the relief

desired. The assured died subsequently from other and different causes.

5 While I agree with counsel for the administrators in the law which he relies upon and in its wisdom, yet I do not think that the facts in this case bring it within the rule insisted upon by him.

An order will be entered in accordance with the views herein expressed.

McCALL, *Judge*.

Endorsed: Filed June 1, 1908, H. M. Doak, Clerk.

The following decree was rendered and only entered of record upon the 29th day of June, 1908, having been held out by counsel. It was entered upon that day nunc pro tunc, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

Equity.

PENN MUTUAL LIFE INSURANCE COMPANY,

vs.

A. H. GRIGSBY et al.

Original Bill.

RUSSELL & BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY et al.

Cross-bill.

This cause came on for final hearing at the April term, 1908, before the Hon. John E. McCall, District Judge, upon the record and proceedings heretofore had and the written stipulation of counsel for both parties to the cross-bill and upon oral argument and briefs of counsel, and, now, upon due consideration thereof, the court is of opinion and decrees that the complainants in the cross-bill, the administrators of John C. Burchard, deceased, have failed to make out their case under their cross-bill and that defendant A. H. Grigsby is entitled to the proceeds of the policy of insurance mentioned in the pleadings.

And it appearing to the court that the proceeds of said policy of insurance have been paid into the registry of the court and loaned out under former order in this cause and borrowed by the defendant Grigsby and that the original complainant, the Penn Mutual Life Insurance Company has been heretofore discharged and the cause dismissed as to it without costs.

It is therefore, ordered, adjudged and decreed that the notes of defendant A. H. Grigsby for the said insurance money borrowed by

him be cancelled and delivered to him, that the cross-bill of the administrators of John C. Burchard be dismissed and that said defendant recover of them and their surety on their cost bond all costs of the cause, including the costs of the original bill and the
 46 lawful commission of the clerk of this court for receiving and loaning out said fund for all of which let execution issue. The complainants in the cross-bill except to the foregoing decree. The following petition for appeal was filed, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

Equity.

PENN MUTUAL LIFE INSURANCE COMPANY,
 vs.

A. H. GRIGSBY et al.

Original Bill.

RUSSELL & BURCHARD, Adm'rs,
 vs.

A. H. GRIGSBY et al.

Cross-bill.

To the Honorable John E. McCall, Judge, etc.:

The above-named R. L. Russell and Lillie Burchard, complainants in the cross-bill in the above entitled cause, conceiving themselves to be aggrieved by the decree of the court made and entered in the above-entitled cause on the — day of —, wherein and whereby among other things it was decreed and directed that complainants said cross-bill be dismissed and the clerk of this court and the special commissioner, H. M. Doak, was ordered and directed to pay over to the defendant, A. H. Grigsby, the fund paid into this court and loaned out under the orders and decrees of this court to the defendant, A. H. Grigsby, and adjudging the costs of the cause against complainants in said cross-bill, together with the fees of said special commissioner, which decree is entered upon the minutes of this court, do appeal to the United States Circuit Court of Appeals for the sixth circuit to be holden at Cincinnati, Ohio, on said order and decree, and from each and every part thereof, for the reasons set out in the assignment of errors which is filed herewith; and they pray that this their petition for their said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the sixth circuit to be holden at Cincinnati, Ohio.

BATES & BATES,
 GEO. T. HUGHES,
Solicitors for Complainants.

The foregoing petition for appeal is granted and the claim of appeal therein made is allowed. Done in open court, this June 18, 1908.

McCALL, *Judge*.

47 Endorsed: Filed June 15, 1908, H. M. Doak, Clerk.

The following assignment of errors was filed, to-wit:

Circuit Court of the United States for the Middle District of
Tennessee.

Equity.

PENN MUTUAL LIFE INSURANCE COMPANY,

vs.

A. H. GRIGSBY et al.

Original Bill.

RUSSELL & BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY et al.

Cross-bill.

Come now R. L. Russell and Lillie Burchard, administrators of John C. Burchard, deceased, and complainants in the cross-bill in the above-entitled cause, and assign errors in the decision and decree of the circuit court in said cause, as follows:

I.

That the United States Circuit Court in and for the Middle District of Tennessee erred in sustaining the demurrer of the defendant, H. H. Grigsby, interposed by said defendant and defendant in error to the cross-bill of complaint filed in said cause.

II.

That the said court erred in sustaining the first ground of demurrer interposed by said defendant and defendant in error to the cross-bill filed in said cause by the said R. L. Russell and Lillie Burchard, administrators, and by holding and deciding that the facts stated in said cross-bill were not sufficient to entitle the complainants in the cross-bill to the relief sought therein.

III.

That the said court erred in sustaining the second ground of demurrer interposed by defendant A. H. Grigsby to that portion of said cross-bill set out in said defendant's demurrer and by adjudging and deciding that the facts stated in that portion of said cross-bill were not sufficient to entitle the complainants to the relief sought therein.

IV.

That the said court erred in sustaining said demurrer interposed by defendant A. H. Grigsby to said cross-bill in dismissing said cross-bill as to so much of said cross-bill as is embraced in and covered by the second ground of demurrer interposed by said defendant.

48

V.

That the said court erred in rendering judgment against complainants in the cross-bill upon the pleadings and facts in the cause and in dismissing said cross-bill of complainants therein. That said judgment was contrary to law and the facts as stated in the pleadings and as appeared in the record in said cause.

VI.

That the said court erred in rendering judgment against the complainants in the cross-bill and their sureties for the costs of the fees of the clerk, H. M. Doak, for loaning the fund, which fees it is averred were for the mutual benefit of both parties and were contracted in preserving and protecting the funds in court and should have been adjudged to be paid out of the fund itself.

VII.

That the said court erred in rendering decree in said cause against the complainants in the cross-bill in this, that it appears from the pleadings and the evidence that at the time of the assignment of the policy which is the foundation of this suit by John C. Burchard, the intestate of the complainants in the cross-bill and the person insured in said policy, that the defendant, A. H. Grigsby, to whom the same was assigned, had no insurable interest in the life of the said John C. Burchard, that he was not a creditor of the said John C. Burchard, nor in anywise related to him, and that he undertook and agreed in said assignment to pay the premiums upon said policy as they might thereafter mature and that said assignment was void as a wagering and speculative assignment of said assured and held to be by said court and the funds the amount of said policy which was paid into this court under the orders and decrees of the court after refunding to the said A. H. Grigsby the amount advanced by him on the faith of said transfer, and the amount of the premiums paid by him, should have been ordered and directed and decreed to be paid over to the complainants in the cross-bill, to-wit, said R. L. Russell and Lillie Burchard, as administrators of the estate of the said John C. Burchard.

Wherefore the said complainants in the cross-bill pray that said judgment of the said court be reversed and such directions be given that full force and efficacy may inure to the complainants in the cross-bill by reason of the matters and things set out therein.

BATES & BATES,
GEO. T. HUGHES,
Solicitors for Appellants.

Endorsed: Filed June 15, 1908, H. M. Doak, Clerk.

49 The following order was made and entered, allowing said appeal, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

Equity.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

Original Bill.

RUSSELL & BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY et al.

Cross-Bill.

On motion of George T. Hughes, Esq., solicitor and of counsel for complainants in the cross-bill in the above-styled cause, to-wit. R. L. Russell and Lillie Burchard, administrators of John C. Burchard, it is ordered that the appeal to the United States Circuit Court of Appeals for the sixth circuit from the final decree heretofore filed and entered herein, be and the same is, hereby allowed and that a certified transcript of the record, testimony, exhibits, stipulations, and of the proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals.

It is further ordered that the bond of appeal be fixed at the sum of five hundred dollars, the same to act as a supersedeas bond and also as a bond for the costs and damages on appeal.

Enter this.

McCALL, Judge.

The following bond was filed for appeal and supersedeas, to-wit:

Circuit Court of the United States for the Middle District of Tennessee.

Equity.

PENN MUTUAL LIFE INSURANCE COMPANY

vs.

A. H. GRIGSBY et al.

Original Bill.

RUSSELL & BURCHARD, Adm'rs,

vs.

A. H. GRIGSBY et al.

Cross-Bill.

Know all men by these present- that we, R. L. Russell and Lillie Burchard, administrators of John C. Burchard, deceased, principals,

and George T. Hughes and J. A. Bates, as sureties, are held and firmly bound unto A. H. Grigsby, in the full and just sum of five hundred dollars to be paid to the said A. H. Grigsby, his attorneys, executors, administrators or assigns, to which payment well
50 and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this the 15th day of June, in the year of our Lord, 1908.

Whereas lately at a Circuit Court of the United States for the Middle District of Tennessee, in a suit pending in said court under the above-styled cause, a decree was rendered against the said R. L. Russell and Lillie Burchard, complainants in the cross-bill as administrators of John C. Burchard, deceased, and the said R. L. Russell and Lillie Burchard as such administrators having obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree of the aforesaid suit and a citation directed to the said A. H. Grigsby is about to be issued citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the sixth circuit to be holden at Cincinnati, Ohio.

Now the condition of the above obligation is such that if the said R. L. Russell and Lillie Burchard, administrators of John C. Burchard, deceased, shall prosecute their said appeal to effect and shall answer all damages and costs, if they fail to make their plea good, then this obligation is to be void; otherwise to remain in full force and virtue.

[SEAL.]

[SEAL.]

[SEAL.]

[SEAL.]

R. L. RUSSELL.

LILLIE BURCHARD.

Surety, GEO. T. HUGHES.

Surety, JASPER A. BATES.

Sufficiencies of the sureties on the foregoing bond approved this 18th day of June, 1908.

HORACE H. LURTON, *Judge*.

Endorsed: Filed June 15, 1908. H. M. Doak, Clerk.

The following citation was issued and service accepted, to-wit:

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

United States Circuit Court of Appeals for the Sixth Circuit.

To A. H. Grigsby, Centerville, Tenn., Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the city of Cincinnati, in said circuit, on the 26th day of August, next, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Middle

51 District of Tennessee, wherein R. L. *Burchard* and Lillie *Russell*, administrators are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 27th day of July, 1908, and of Independence the one hundred and thirty-third year.

E. T. SANFORD, *Judge*.

Service of the foregoing citation accepted this the 28th day of July, 1908.

PITTS & McCONNICO,
Solicitors for Appellee.

I, H. M. Doak, clerk of the Circuit Court of the United States for the Middle District of Tennessee, hereby certify that the foregoing is a true, perfect and complete copy of the record in the above-styled cause, as the same is on file or of record in my office. In witness whereof, I have hereunto signed my name and affixed the seal of the court, at my office in Nashville, Tennessee, this the 28th day of July, 1908.

[SEAL.]

H. M. DOAK, *Clerk*.

52 And afterwards, to-wit, on the 11th day of August, A. D. 1908, an appearance was filed in said cause clothed in the words and figures, as follows, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1864.

A. L. RUSSELL and LILLIE BURCHARD, Adm'ts of John C. Burchard,
Dec.,
vs.
A. H. GRIGSBY.

Frank O. Loveland, Clerk of said Court:

Please enter *my* appearance as Counsel for the Complainants.

BATES & BATES.

And afterwards, to-wit on the 4th day of February, A. D. 1909, an entry was made on the journal of said Court in said cause, clothed in the words and figures, as follows, to-wit:

Opinion.

55 Filed Mar. 22, 1909. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 1864.

RUSSELL & BURCHARD, Adm's,

v.

A. H. GRIGSBY.

Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

Submitted February 4, 1909.

Decided March 2, 1909.

Before Lurton and Severns, Circuit Judges, and Knappen, District Judge.

LURTON, Circuit Judge, delivered the opinion of the court:

Under a bill of interpleader, the Penn Mutual Life Insurance Company, a corporation of the State of Pennsylvania, paid into the court below ten thousand dollars due from it upon a policy of insurance upon the life of John C. Burchard, and the only question is as to whether the fund shall be paid to an assignee of the policy or to the administrators of the assured.

The facts necessary to be stated are these: Upon the personal application of the assured, John C. Burchard, an ordinary life policy was issued to him January 23, 1903. The assured lived in Tennessee. The contract was actually concluded at the office of the company at Philadelphia, and the contract on its face provided "that the place of contract shall be the city of Philadelphia, state of Pennsylvania." It was payable to the "executors, administrators or assigns" of the assured. But in respect of assignments it was provided, "that any claim against the company arising under an assignment of this policy shall be subject to proof of interest." The assured paid two annual premiums. The third fell due January 23, 1905. The assured had in the meantime met with financial misfortune and was unable to meet this premium. He had also incurred a serious injury which necessitated a grave surgical operation, and was without the means to obtain the service needed. In this critical condition he sold and delivered his policy to the defendant in error, receiving for the same \$100.00 dollars in money and the engagement of Dr. Grigsby that he would pay the premium then past due and all future premiums. The assignment executed was in these words:

"In consideration of the sum of one hundred dollars (\$100.00) paid to me, the receipt of which is acknowledged and the further

consideration of the payment to the company of the premium upon the life insurance policy hereinafter mentioned, now due and payable, as well as the payment of the premiums hereafter to accrue upon said policy, I, John C. Burchard, insured as John Cook Burchard, do hereby assign, transfer and convey to A. H. Grigsby my life insurance policy in the Penn Mutual Life Insurance Company of Philadelphia, for ten thousand dollars (\$10,000.00), No. 230176, of date January 26, 1903, together with all the legal rights and interest I have in the same and all the benefit, interest and right accruing by virtue of same.

"To have and to hold unto the said A. H. Grigsby absolutely, and I hereby authorize said Life Insurance Company to pay to the said A. H. Grigsby the sum insured at my death upon the conditions mentioned in said policy. Executed in duplicate this the — day of February, 1905."

A copy duly acknowledged was sent to the insurer. The assignee paid two annual premiums when the assured died of a disease not traceable to the injury he had sustained. The insurer, being notified that the amount due under the policy was claimed both by the assignee and the administrators of the assured, filed a bill of interpleader against the contestants and was discharged upon paying the fund into court. Upon this state of facts the court below adjudged the fund to the assignee.

Dr. Grigsby, the appellee and assignee of the policy, was not related to Mr. Burchard. Neither was he a creditor. He had, therefore, no insurable interest in the life of the assured whatever. If, therefore, this policy had been originally obtained in pursuance of some agreement or understanding that it should be assigned to and carried by him, the transaction would have been a wagering or gambling transaction under all the cases and invalid as against public policy. But that is not the case. The policy was applied for by the assured without any purpose of assigning it. After paying two annual premiums he was driven to sell it for what he could get. This raises the single sharp issue as to whether one who has no insurable interest in the life of an assured is to be protected in his right as assignee of a policy, originally issued in good faith to the assured beyond the actual amount of his disbursements on account of the transaction.

In the absence of restrictions imposed by the contract such a policy is an assignable chose in action, provided the assignment is not one forbidden by settled principles of public policy. The contract of insurance was one thing and the contract of assignment was another. The insurance contract was made in Pennsylvania and provides that the place of contract shall be the state of Pennsylvania. This is an obligatory term, and the contract of insurance will be construed according to the law of Pennsylvania. *Penn Mutual Ins. Co. v. Mechanics' Bank*, 72 F. R. 413. In the absence of such a term in the contract the construction and interpretation of a policy of insurance is a question of general and not local law. *Carpenter v. Providence Insurance Co.*, 16 Peters 495. But the contract of assignment, so far as it is not affected by any term of the policy, was

made in Tennessee, and its interpretation and validity must be determined by the law of the place of the execution of the assignment. There is no question of construction, and the validity of the assignment depends upon whether the contract of assignment was contrary to principles of public policy.

58 What, then, is the law of Tennessee? There is no applicable statute law. Section 3516, Shannon's Tenn. Code, has been referred to as having some bearing. That provision makes assignable certain obligations not negotiable at the common law, and gives to the assignee the right to maintain an action in his own name. Policies of life insurance have been held to be within it. *Mutual Insurance Co. v. Hamilton*, 5 Sneed 269; *Scobey v. Waters*, 10 Lea 551, 561. The statute plainly does not qualify one to take by assignment a policy of life insurance who is disqualified by considerations of public policy. *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116; *Brennan v. France*, 142 Penn. St. 301; *Insurance Co. v. Lane*, 151 F. R. 276.

There being no Tennessee statute which affects the question, it is obviously one to be determined by the general law, and the decisions of the Tennessee courts are not obligatory upon a court of the United States. Section 721 U. S. R. S., being section 34 of the Judiciary Act of 1789, which provides that "The laws of the several states" * * * "shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply," has been construed as limited to local statutes and local usages, and as not applying to questions of general law not based on local statutes or usages nor involving settled local rules of property having a situs within the state. *Swift v. Tyson*, 16 Peters 19; *Carpenter v. Providence Ins. Co.*, 16 Peters 495; *Railroad v. National Bank*, 102 U. S. 14, 29 et seq.; *B. & O. Railroad v. Baugh*, 149 U. S. 378; *Hartford Ins. Co. v. Railroad*, 175 U. S. 100. Although the assignment here in question was made in Tennessee and between citizens of that state whose rights are to be determined by a court of the United States sitting in that state, its validity does not depend upon a local statute or usage and must be determined by the court, as it would be if before a court of the state, upon principles of general law. When that is the situation, Federal courts are under obligation to exercise an independent judgment when such judgment must lead them to a different conclusion from the local courts. *Carpenter v. Providence Ins. Co.*, 16 Peters 495; *Hartford Ins. Co. v. Railroad*, 70 F. R. 201, 203; *Gordon v. Ware National Bank*, 132 F. R. 444, 446; *Insurance Co. v. Lane*, 151 F. R. 276, affirmed by the Circuit Court of Appeals, 157 F. R. 1002.

With respect to the particular question of general law here involved, there cannot be said to be any clearly defined and well settled rule of decision in the Supreme Court of Tennessee. The question seems never to have been definitely decided until the unreported case of *Lewis v. Edwards*, decided, December 14, 1903, in which a bare majority of the court reversed a majority opinion of the Tennessee Chancery Court of Appeals. Undoubtedly, neither

the fact that no opinion was filed nor that the judgment was that of only a majority of the court would affect its force and effect if we were compelled to follow the decisions of that court. As we are under no such obligation, we feel less reluctance in reaching a different conclusion, because there seems to be no settled line of decisions in that state.

Coming, then, to the validity of an assignment of a policy of life insurance, applied for and carried in good faith by the assured, and transferred as a matter of financial necessity to a person having no insurable interest in the life of the assured, we are compelled to confess that there is a hopeless division between the decisions of the courts which have directly passed upon the question. The view taken by perhaps a decided majority of the state courts is that in such circumstances an assignment should be upheld as serving to give a greater sale value to such instruments by widening the class of possible purchasers, and that public policy is best subserved by upholding the commercial character of such contracts when there has been no connection between the assignee and the inception of the contract of insurance. Among the opinions which uphold this view we may cite: *Mutual Ins. Co. v. Allen*, 138 Mass. 564; *Rylander v. Allen*, 125 Ga. 206, and *Olmstead v. Keyes*, 85 N. Y. 593.

Among the cases holding that such assignments to one having no insurable interest in the assured are contrary to public policy, may be cited: *Downy v. Hoffer*, 110 Pa. St. 109; *Helmetag's Adm. v. Miller*, 76 Ala. 183; *Life Ins. Co. v. Sturges*, 18 Kan. 93; *Franklin Ins. Co. v. Hazzard*, 41 Ind. 116. The English decisions throw little light upon the subject. The cases are few and turn mainly upon the construction of the Act of 14 Geo. III, ch. 48. That statute declared void any policy in favor of one who "shall have no interest" in the life of the assured. The third section of the Act is in these words: "That in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer than the amount or value of the interest of the insured in such life or lives, or other event or events." In *Goodsall v. Boldero*, 9 East 72, decided in 1807, the action was by the payee of a policy taken by certain creditors of the great William Pitt. There was no question but that the necessary interest in the life of the debtor statesman existed when the policy issued, and that when the assured died this interest had not ceased. The debt was in excess of the amount of the policy and was unpaid. The debtor's estate was likewise insolvent. But before suit, the English Parliament assumed all of Mr. Pitt's debts and paid them, including the debt of the plaintiffs. Lord Ellenborough, C. J., held that the creditors, having sustained no loss by the death of the assured, his debts having been paid, could maintain no action under the statute. In *Ashley v. Ashley*, 3 Simons 147, Vice-Chancellor Shadwell, after referring to the statute, contented himself with saying, "Now, there is not a word said here as to the assignment of policies." In *Dalby v. The India & London Assurance Co.*, 1854—15 C. B. 365, the word "hath" in the third section, set out above, was construed as referring to an

interest in the life of the assured "at the time of effecting the insurance," and that such interest need not continue until death of the assured, thus overruling *Goodsall v. Boldero*.

The decisions by the Supreme Court of the United States, curiously enough, are cited by learned counsel for both views of the question, and, what is still more odd, are cited in more than one opinion as authority for antagonistic conclusions. This is a misapprehension due to a casual examination, for there can be no doubt that the plain trend of opinion in that court has been in the direction of requiring any claimant to the proceeds of a policy to show an interest in the life of the assured. In order of time, the cases in that court are as follows: *Cammack v. Lewis*, 15 Wall. 643; *Conn. Mutual Ins. Co. v. Schaefer*, 94 U. S. 457; *Aetna Life Ins. Co. v. France*, 94 U. S. 561; *Warnock v. Davis*, 104 U. S. 775; *New York Mutual Ins. Co. v. Armstrong*, 117 U. S. 597; *Crotty v. Insurance Co.*, 144 U. S. 621.

Cammack v. Lewis was a suit by the administratrix and widow of the assured against an assignee of a policy upon her husband's life, the assured being the beneficiary, to whom the policy had been assigned, and to whom on the death of the assured the policy had been paid by assent of the widow. The policy was taken out by Lewis at the suggestion of Cammack, a creditor, to the extent of \$70.00, under an agreement that it should be assigned to Cammack, who undertook to pay the premiums and one thousand dollars to the widow of the assured out of the policy when collected. Although Cammack had collected the policy and had paid over to the widow one thousand dollars under the agreement and in full satisfaction of any claim she might have, she was permitted to recover from him the entire sum collected by him, less only the actual amount of his debt and the premiums paid by him.

Conn. Mutual Ins. Co. v. Schaefer, 94 U. S. 451, was an action upon a policy of joint insurance payable to the survivor, the assured being husband and wife. There was a divorce. The subsequent premiums were paid by the wife, who survived the husband. The action was by the survivor. She was permitted to recover, the court holding that having an insurable interest when the policy issued, it did not become invalid because her interest in the life of her husband had ceased by divorce. The case is plainly sustainable as joint insurance, and this is distinctly conceded, for the court says: "The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of an interest avoids a policy good at its inception." The court did, however, go on and decide that a policy, "valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provision of the policy itself." The court, however, added, "that in cases where the insurance is effected merely by way of indemnity, as where the creditor insures the life of a debtor, for the purpose of securing his debt, the amount of his insurable interest is the amount of his debt." Upon this general principle, the court in that case laid down the proposition that

"an interest of some kind in the insured life must exist," and that "it is generally agreed that a mere wager policy—that is, policies in which the insured party has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void as against public policy."

In *Aetna Life Ins. Co. v. France*, the court held that a policy taken out by a brother in favor of a sister was valid, the relation involving an insurable interest, although the beneficiary was to pay the premiums.

The case of *New York Mutual Ins. Co. v. Armstrong*, 117 U. S. 591, has no bearing. The policy under both the so-called majority and minority rules was valid, as it was taken out in favor of one who had no sort of insurable interest in the life of the assured. The case went off upon the ground that the beneficiary had been convicted and executed for the murder of the assured committed to mature the policy, the other point not being made. The facts of that case afford a strong commentary upon the impolicy of relaxing the rule of public policy which forbids any contract whereby one obtains an interest in the destruction of the life of another.

The principal case is that of *Warnock v. Davis*, 104 U. S. 775. That was a suit by the administrator of one Crosser against the assignees of a policy upon the life of Crosser which had been assigned to them the plaintiff was held to be entitled to recover, subject to the deduction of the actual sum paid by the assignees to keep up the policy and the amount paid over to the widow of the assured under the contract of assignment. The statement of the case shows that Crosser applied for the policy on February 27th, 1872. On the same date he entered
63 into an agreement with the defendants that the policy should be assigned to them in consideration of all dues thereon and one-tenth of the policy when collected to the wife of the assured. It also appears that the policy bore date of February 27th, 1872; and that on the next day, February 28th, 1872, it was assigned according to the agreement of February 27th. Notwithstanding these facts, the court treated the case as that of a policy valid when issued and subsequently assigned upon the consideration mentioned. Upon this point the court, speaking by Mr. Justice Field, said:

"The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him, or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination."

Again the court said:

"The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name. Nor is its character changed because it is for a portion merely of the insurance money. To the extent in which the assignee stipulates

for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded, if the policy, or an interest in it, could, in consideration of paying the premiums and assessments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred so as to entitle the assignee to retain the whole insurance money."

The court refers to and states the facts in *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116, where the assured found himself unable to pay the second premium, and therefore sold it to avoid a total loss for forfeiture to one having no insurable interest and assigned it with the consent of the insurers, the assignees paying the unpaid premiums, and quote with approval the judgment of the Indiana court that the assignment was void because "all the objections against the issuing of a policy to one upon the life of another, in whose life he has no insurable interest, exist against holding such a policy by mere purchase and assignment. That in either case the holder of such a policy is interested in the death rather than the life of the party assured."

Justice Field also refers to the decisions of the New York Court of Appeals as opposed to the Indiana case, saying:

"They hold that a valid policy of insurance effected by a person upon his own life, is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. *St. John v. American Mutual Life Insurance Company*, 13 N. Y. 31; *Valton v. National Loan Fund Life Assurance Company*, 20 id. 32. In the opinion in the first case the court cite *Ashley v. Ashley* (3 Simons 149) in support of its conclusions; and it must be admitted that they are sustained by many other adjudications. But if there be any sound reason for holding a policy invalid when taken out by a party who had no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other—so far, at least, as to restrict the right of the assignee to the sums actually advanced by him. In the conflict of decisions upon this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

In this conclusion we are supported by the decision in *Cammack v. Lewis*, 15 Wall. 643. There a policy of life insurance for \$3,000, procured by a debtor at the suggestion of a creditor to whom he owed \$70, was assigned to the latter, to secure the debt, upon his promise to pay the premiums, and, in case of the death of the assured, one-third of the proceeds to his widow. On the death of the assured, the assignee collected the money from the insurance company and paid the widow \$950 as her portion after deducting certain payments made. The widow, as administratrix of the deceased's estate, subsequently sued for the balance

of the money collected, and recovered judgment. The case being brought to this court, it was held that the transaction, so far as the creditor was concerned, for the excess beyond the debt owing to him, was a wagering policy, and that the creditor, in equity and good conscience, should hold it only as security for what the debtor owed him when it was assigned, and for such advances as he might have afterwards made on account of it; and that the assignment was valid only to that extent. This decision is in harmony with the views expressed in this opinion."

It is impossible, with due respect for that tribunal, to treat this opinion as mere dictum. To do so would be simply to say that the court did not decide the case that was **before** them but another and non-existent case.

In *Crotty v. Union Mutual Ins. Co.* 144 U. S. 621, the policy was payable to O'Brien on January 15, 1841, "or if said O'Brien shall die before that time to pay said sums" ——— "to Michael Crotty his creditor, if living, if not then to said O'Brien's executors, administrators or assigns." There was evidence that O'Brien was largely indebted to Crotty at the inception of the policy. O'Brien died in 1883, and Crotty made proof of death and sued, averring that "he had otherwise performed all of the conditions of the contract." The answer denied that the assured was ever indebted to Crotty or that he had performed the conditions except by furnishing proof of death. On the trial there was no other evidence of the interest of the plaintiff in the policy than that afforded by the policy itself and an averment in the proofs of death that he claimed "as creditor of the deceased and beneficiary named in the policy." The court upon this state of the case instructed a verdict for the insurer and this judgment was affirmed. The question of public policy in respect of the necessity of an insurable interest to sustain a policy of life insurance was referred to in these words by Justice Brewer, who announced the opinion of the court:

66 "It is the settled law of this court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts in insurance have been repeatedly denounced. *Cammack v. Lewis*, 15 Wall. 643, in which a policy of \$3,000, taken out to secure a debt of \$70, was declared "a sheer wagering policy." *Connecticut Mutual Life Insurance Co. v. Schaefer*, 94 U. S. 457, 461, in which it was said: 'In cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor, for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.' *Warnock v. Davis*, 104 U. S. 775."

As to the insurable interest of a creditor in the life of his debtor, the court said:

"If a policy of insurance be taken out by a debtor on his own life, naming a creditor, as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein, and the policy becomes one for the benefit of the insured, and collectable by his executors or administrators. In 2 May on Insurance (3d ed.,) sec. 459a, the

author says: 'A creditor's claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums and expenses should go to the debtor and his representatives, or remain with the company, according as the insurance is upon life or on property.'

Referring to the terms of this policy and the facts of the particular case, the learned Justice said:

"Still, again, not only does justice between the parties, but also that public policy which denounces wagering contracts, require that the proof of indebtedness should be distinct and satisfactory. It would tend to a successful consummation of wagering contracts in insurance if the mere recital in the policy was held sufficient to sustain a recovery in favor of the alleged creditor, no matter how long after the date of the policy the death of the insured happened. Admissions, whether direct or incidental, should never be carried beyond their actual extent, or the reasonable inferences therefrom, and should not be invoked to work injustice to parties litigant, or thwart the demands of sound public policy."

67 This review of the decisions and opinions of the Supreme

Court leads us to the conclusion that an insurable interest is absolutely essential to the support of a policy of insurance upon the life of a third person. Without such an interest the beneficiary has no interest in the continuance of the life of the assured but rather an interest in its early termination. The field of doubt is as to what is an insurable interest. That one has such an interest in his own life is clear. That he has also such an interest in the life of a close relative by blood or marriage, such as parent and child, husband and wife, there is no dispute. When we pass beyond those relations where there is both a legal and a moral responsibility for support and maintenance we approach the debatable line. It may be safely said that when a recognized legal dependency does not exist, nor the relation of creditor and debtor, an insurable interest must involve some reasonable expectation of pecuniary benefit or advantage from the continuance of the life of the assured. In *Kentucky Life Ins. Co. v. Hamilton*, 63 F. R. 93, we had occasion to refer to the fact that one may have an insurable interest by reason of expectations or advantages dependent upon the continuance of the life of the assured independent of those blood or marital relations usually deemed essential. In *Warnock v. Davis*, 104 U. S. 775, 779, the court upon this subject say:

"It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation; for a parent has an insurable interest in the life of his child, and a child in the life of the parent, a husband in the life of his wife and a wife in the life of

her husband. The natural affection in cases of this kind is considered as more powerful—as operating more efficaciously—to
68 protect the life of the assured than any other consideration.

But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned, as being against public policy."

The courts are not agreed as to the extent of the insurable interest of a creditor or of one standing in an equivalent business relation, such as that of partner, joint adventurer, master or servant.

The cases of *Cammack v. Lewis*, *Warnock v. Davis* and *Crotty v. Union Mutual Insurance Co.*, strongly tend to show that the Supreme Court of the United States regard the insurable interest of one in the relation of creditor as measured by the extent of the debt or business obligation. When the debt is paid, or the business relation terminated, the interest ceases and the claim of such a beneficiary is cut off, both as to the insurer and the assured, or those representing him. There is, moreover, a marked difference between the consequences resulting from a policy taken out by one having no insurable interest and the subsequent assignment of a policy issued to one upon his own life and afterwards assigned to one having no interest in the continuance of the life assured. In the first case the contract of insurance is invalid, in the other it is valid and the assignment invalid. In the first case the insurer has never become liable upon the contract. In the other the liability of the insurer to somebody is unaffected by the assignment in the absence of some term in the insurance contract avoiding it if assigned. The British Act of 14 Geo. III, Ch. 48, deals alone with the validity of the contract of insurance itself. In *Warnock v. Davis*, cited above, the contract of insurance was not affected because it had been assigned, although the agreement for such assignment antedated the policy.

The same is to be said of the contracts in every one of the
69 cases decided by the Supreme Court of the United States.

Undoubtedly the contract of insurance in the case at bar was valid. The only question is as to the legal effect of its subsequent assignment. The invalidity of that need not in any way affect the liability of the insurer to the representatives of the assured. Hence it is, that the payment by the insurer of the amount of the policy into court has no consequence upon the legal or equitable rights of the rival claimants to the proceeds. The company was liable in any event to somebody, unless some term of the contract made the claim uncollectable at all in case of an assignment. That is not the case here, for the clause making the claim of an assignee subject to proof of interest would only limit the recovery of the assignee to a sum measured by his interest and leave the company liable to the representatives of the assured for the rest. What, after

all, is the moral or legal distinction between an assignment by an assured to one having no interest in his life, made with or without some ante-policy agreement for such assignment? There is undoubtedly a sharp conflict between the decided cases, as we have already noticed. What is the attitude of the Supreme Court upon the question of public policy? Upon this question we must hold that the Supreme Court of the United States recognizes no such distinction. To quote from *Warnock v. Davis*: "The assignment of a policy to a party having no insurable interest is as objectionable as the taking out of a policy in his name." * * * "If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same grounds which invalidate the one should invalidate the other—so far, at least, as to restrict the rights of the assignee to the sums actually advanced by him. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.

70 Coming to the case for decision. Grigsby had confessedly no insurable interest in the life of Burchard. Under all the cases, if he had been named as beneficiary in the policy under an agreement to pay the premiums, or had an agreement for its assignment when issued, the assignee to pay the premiums, the policy in the one case and the assignment in the other would be illegal and unenforceable. The reason for this result, and the only reason would be found in the fact that such a beneficiary or assignee would have no interest in the continuance of Burchard's life but an interest in his speedy death. This speculative interest in human life is obviously contrary to sound public policy. The case we have differs from the one just stated only in the fact that Grigsby was not the appointee in the policy and did not become an assignee by any arrangement antedating the policy. Burchard found himself unable to pay the third premium and in need of one hundred dollars to obtain a surgical operation of a serious character. Grigsby agreed to give him the one hundred dollars needed in this extremity, to pay the past due premium and all other premiums which should thereafter fall due and take an assignment of the policy. Can one imagine a more purely speculative transaction in which human life was at stake? Burchard might not survive the very operation which he was immediately to undergo. If this should prove the case, for one premium and one hundred dollars he would at once realize ten thousand dollars. When each recurring premium came due a like problem was presented to the assignee. "If I pay this he may die before I have to pay again," would be his natural reflection. He took the chance twice and before he was required to take another Burchard died. Plainly the transaction was a gambling or wagering bargain and Grigsby had an interest against and not an interest in the continuance of Burchard's life. The evil inseparable from such a bargain is undoubtedly mitigated when the whole of the premiums has

been paid once for all, or when the assured is to keep the policy alive. The cost of carrying the policy would not rest upon the assignee and to that extent his interest in the early termination of the life of the assured would be lessened. Among the authorities which regard this circumstance as in a large degree affecting the validity of such contracts are: May on Insurance, Sec. 112, *Foster v. Insurance Co.*, 125 F. R. 536, *Gordon v. Ware Nat. Bank*, 132 F. R. 444, 447, *Heinlein v. Imperial Life Ins. Co.*, 101 Mich. 250, 254, *Scott v. Dickson*, 108 Pa. St. 6, and *Campbell v. Insurance Co.*, 98 Mass. 381. Where, as in this case, the assignee undertook himself to pay the recurring premiums we are unable to see why the contract of assignment is not as much a gambling contract as if the policy had been issued under an agreement that it should be assigned. The argument against such a conclusion is bottomed upon the commercial idea that considerations of public policy which restrain the assignability of such contracts are not enough in this commercial age to justify the disadvantages to follow from the full right of an assured to do as he will with a contract in which he is the payee. Nowhere is this view of the subject more clearly stated than by Judge Sanborn in speaking for the Circuit Court of Appeals for the Eighth Circuit, in *Gordon v. Ware Nat. Bank*, 132 F. R. 444, 449, where he says:

"This is a great commercial nation. The policy of the nation, the business habits and acts of its citizens and the tendency of the decisions of its courts are to depart more and more from the old rules that choses in action are not assignable, to make them more and more the subjects of traffic and of commerce, and to sustain their transfers in the ordinary course of business."

The fields of finance and commerce are sufficiently broad without extension in the direction of the negotiability of contracts which have their origin in the wholesome desire to provide for the contingencies of life, the hazards of business and the support of those survivors dependent upon the assured. Their use as collateral, to secure an actual advance made at the time and the payment of premiums necessary to carry the contract, is recognized by the courts which regard sound public policy as opposed to mere speculative bargains based upon the chances of the continuance of human life.

We have not overlooked the fact that the policy on its face provides that "any claim against the company arising under an assignment of the policy should be subject to proof of interest." Thus the company might escape payment, not of the policy for that was undoubtedly valid when issued, to an assignee who could not show an interest. The contention is that this clause is inserted solely for the benefit of the insurer and that it has no effect as between the assured and his assignee. It is thus said that the insurer having paid the money into court has thereby waived this clause. In support of this counsel for appellee cite *Mechanics' Nat. Bank v. Comins*, 72 N. H. 12, *Spenser v. Meyers*, 150 N. Y. 269, as well as certain other cases not much in point. We are not disposed to assent to the proposition that a clause of this character is inserted wholly for the benefit of the insurer. It is there

in recognition of public policy in respect to the necessity of an insurable interest. When Burchard and Grigsby made the agreement of assignment they must be taken to have had knowledge of this limitation. The assured as well as the general public were concerned. A different principle might apply if the limitation were one plainly inserted for the benefit of the insurer alone. This distinction is recognized by May on Insurance, Sec. 110, and in *Stevens v. Warren*, 101 Mass. 564, 566. In that case the policy forbid any assignment without the consent of the insurer. The policy was assigned to one who had no interest in the life of the assured, but the proceeds were paid by the company without objection to the administrator of the assured. The bill was one of interpleader to determine the rights of the administrator of the assured and the assignee. After saying that the assignment could only take effect, the company not having assented, "as a designation by mutual agreement" of the assured and the assignee, the court said:

"The purpose of the clause in the policy, forbidding assignments without the assent of the company, is undoubtedly to guard against the increased risks of speculative insurance. The insurers are entitled to the full benefit of such a provision, as a matter of contract; and, as the policy of the law accords with its purpose, the court will not regard with favor any rights sought to be acquired in contravention of the provision.

73 "The administrator will therefore hold the proceeds of the policy as assets of the estate of his intestate, discharged of any claim thereto under the assignment of the policy to Dewey K. Warren."

But if there is no question of public policy involved in respect of the assignability of such contracts the clause, in the circumstances of this case, is of little consequence. Certainly the waiver of the clause does not affect the question of the validity or invalidity of the assignment as between the assured and the assignee. The conclusion of the whole matter is that the assignment is valid to the extent of the money actually paid for it as well as for all advances of premiums subsequently made. Beyond this it is a gambling contract and not enforceable.

Decree will be reversed with directions to enter a decree reimbursing Dr. Grigsby as indicated and for the payment of the remainder of the fund to the administrators of the assured.

74 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of A. L. Russell and Lillie Burchard, Adm'rs, vs. A. H. Grigsby, No. 1864, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and

affixed the seal of said Court, at the City of Cincinnati, Ohio this 9th day of April, A. D. 1909.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,

*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

75 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which R. L. Russell and Lillie Burchard, Administrators of John C. Burchard, deceased, are appellants, and A. H. Grigsby is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the Circuit Court of the United States for the Middle District of Tennessee, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed

76 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of June, in the year of our Lord one thousand nine hundred and nine.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

UNITED STATES CIRCUIT COURT OF APPEALS,
Sixth Judicial Circuit, ss:

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the transcript of the record and proceedings in this Court in the above entitled case hereby certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the foregoing writ of certiorari I now hereby certify that on the 12th day of June A. D. 1909, there was filed in my office a stipulation in the above entitled case in the following words, to wit:

"United States Circuit Court of Appeals for the Sixth Circuit.
A. H. Grigsby, Plaintiff in Error vs. R. L. Russell and Lillie Burchard, Administrators of John C. Burchard, deceased, Defendants in Error. Stipulation."

It is hereby stipulated and agreed that the certified transcript of the record in the above entitled cause, already on file in the office of the Clerk of the Supreme Court of the United States, which was filed with the petition for the writ of certiorari in this cause, be taken as a return to said writ of certiorari, which was granted by the Supreme Court of the United States on the first day of June, 1909; and it is stipulated and agreed that this stipulation may be the authority of the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit for making his return accordingly to said writ of certiorari.

JOHN A. PITTS,
K. T. McCONNICO,
MONTAGUE S. ROSS,

Counsel for Plaintiff in Error, A. H. Grigsby.

GEO. T. HUGHES,
J. A. BATES,

*Counsel for Defendants in Error, R. L. Russell
and Lillie Burchard, Adm'rs.*

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

Witness my official signature and the seal of the said United States Circuit Court of Appeals this 15th day of June A. D. 1909.

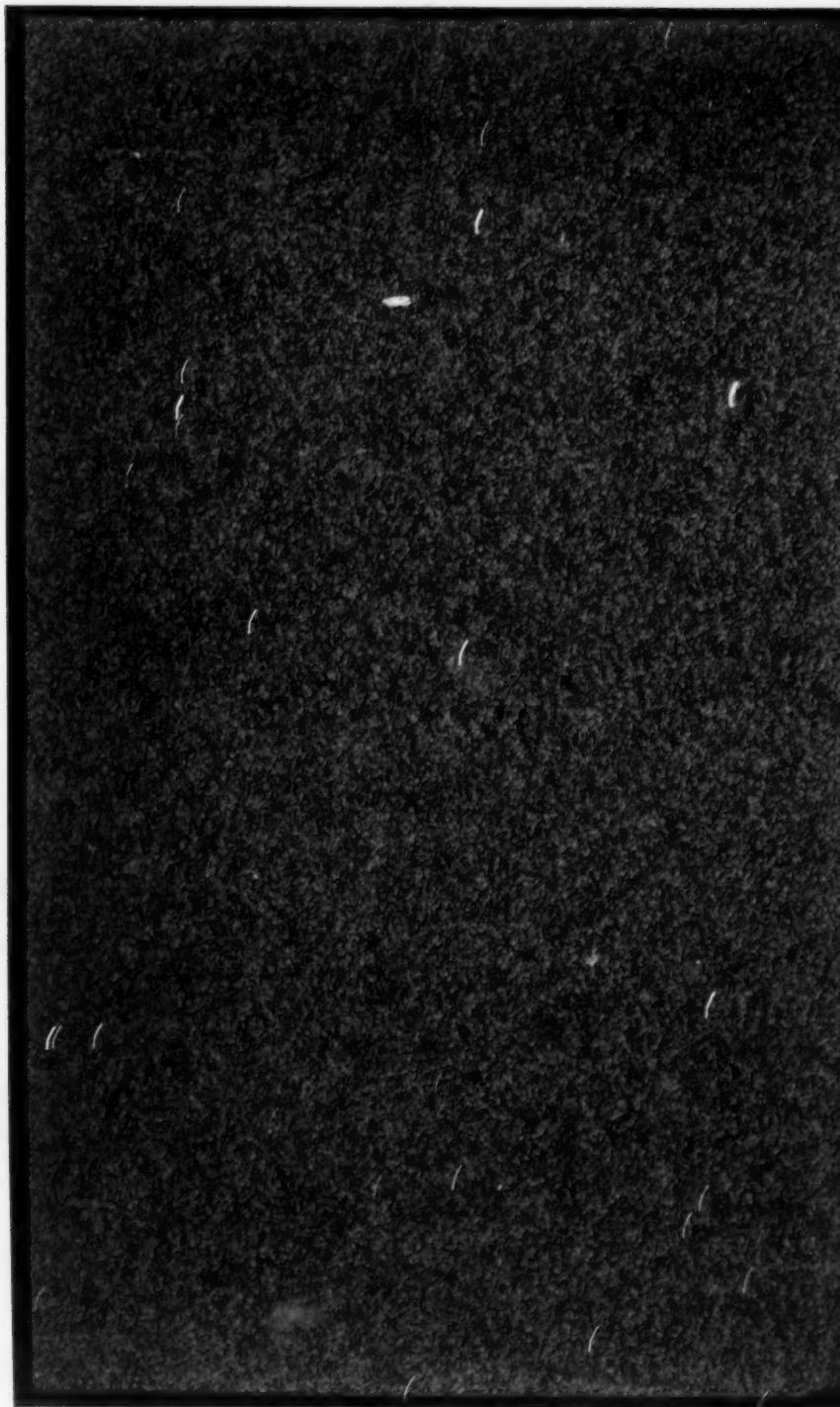
[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk United States Circuit Court of
Appeals for the Sixth Circuit.*

77 [Endorsed:] 461-'09. 21682. File No. 21,682. Supreme Court of the United States. No. 886, October Term, 1908. A. H. Grigsby vs. R. L. Russell & Lillie Burchard, Adm'rs, &c. Writ of Certiorari.

78 [Endorsed:] File No. 21682. Supreme Court U. S. October Term, 1910. Term No. 225. A. H. Grigsby, petitioner, vs. R. L. Russell & Lillie Burchard, Adm'rs, &c. Writ of Certiorari & return. Filed June 17th, 1909.





SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No.

A. H. GRIGSBY, PLAINTIFF IN ERROR,

vs.

R. L. RUSSELL AND LILLIE BURCHARD, ADMINIS-
TRATORS OF JOHN C. BURCHARD, DECEASED, DEFENDANTS
IN ERROR.

ON CERTIORARI TO UNITED STATES CIRCUIT COURT OF
APPEALS FOR SIXTH CIRCUIT.

**BRIEF AND ARGUMENT FOR PLAINTIFF IN
ERROR.**

May it please the Honorable Court:

This case turns upon the validity or invalidity of the sale and assignment for value and in good faith of a valid and binding life-insurance policy by the owner to one who has no insurable interest in the life insured.

The litigation was begun by a bill of interpleader filed by the insurer, a Pennsylvania corporation, against the assignee and the administrators of the insured in the United States Circuit Court for the Middle District of Tennessee, where the assignment was upheld, first, by Judge Clark upon a demurrer, and again by Judge McCall on final hearing upon the merits. Upon appeal by the administrators the Circuit Court of Appeals reversed the judgment, and the case is here upon certiorari granted by this court.

The Pleadings and Facts.

No question is made upon the pleadings. In substance and in brief they may be thus stated:

1. The insurer, the Penn Mutual Life Insurance Company, in its bill of interpleader admitted its liability upon the policy in question, alleged that the right to receive the proceeds was in dispute between the assignee and personal representatives of Burchard, the insured, and prayed that defendants be required to interplead, and that it have leave to pay the amount of the policy (\$10,000) into court and be discharged (Printed Record, pp. 1-3).

2. The defendants having answered, admitting it was a proper case for interpleader, they were ordered to interplead; permission was given complainant to pay the amount of the policy into the registry of the court, and the complainant was discharged and dismissed (Rec., p. 11).

3. Thereupon the administrators filed their cross-bill against the assignee, alleging, besides the undisputed facts presently to be stated, (1) that the assignment was void as a "gambling and wagering contract," by reason of the fact that the assignee was without insurable interest in the life of the insured, and (2) that the policy by its terms was not assignable to one without insurable interest; also that the

assignment was procured by fraud and undue influence, and that the insured was at the date of the assignment of unsound mind and mentally incapable of making it (Rec., pp. 12-15).

4. The assignee specially demurred to the parts of the cross-bill marked (1) and (2) above (Rec., pp. 16-17), and this demurrer was sustained and these parts of the cross-bill dismissed (Rec., pp. 25-26).

5. Defendants answered and denied the other parts of the cross-bill (Rec., pp. 18-21), and no proof was offered in support of them.

The facts are wholly undisputed. The following stipulation, signed by counsel for both parties, was filed and will be found at pages 26 to 28 of the record. The exhibits referred to follow on the succeeding pages:

"In this case, in order to save the expense of taking depositions, the following facts are admitted:

"That the policy which is the foundation of this suit was assigned by the insured John C. Burchard to defendant A. H. Grigsby on or about the 15th or 16th of February, 1905, the said Burchard having paid the first and second premiums, due January, 1903, and January, 1904; that the assignment was prepared by an attorney of said Burchard and at said Burchard's instance and was in the form set out in the answer of the defendant Grigsby in this case and the original, with the certificate of acknowledgment thereon is hereto attached, marked A.

"That the assignment of said policy to defendant Grigsby was made under the following circumstances:

"Defendant Grigsby was approached by the assured, Burchard, to sell him the policy. Burchard exhibited the policy to him and offered it for \$100. On its face, the policy appeared to be then forfeited for non-payment of the premium due January 26, 1905, there being in or on the policy no provision

for any grace or extension beyond the day of payment, nor any non-forfeiture clause or provision for any sort of extension until after three premiums had been paid, which defendant could discover. Burchard claimed that he had some sort of agreement or understanding with the company whereby the past-due premium could yet be paid and the life of the policy saved, and suggested to defendant that he could communicate with Mr. Lamar, the agent at Nashville, and confirm his statement that the premium would then be accepted. Burchard was then a young man, unmarried, and apparently in good health, except the injury referred to below. Defendant agreed to purchase the policy if the agent would confirm the statement of Burchard that the premium could then be paid and the policy preserved. Defendant then communicated by telephone with the agent, Lamar, who confirmed Burchard's statement. Thereupon defendant at once sent his check to Lamar for the premium and paid Burchard \$100 and Burchard went off and got a lawyer to prepare the assignment, defendant not being present or consulting the lawyer. The assignment was executed in duplicate, one being sent to the company and the other retained by the defendant. The policy was immediately delivered to defendant and thereafter kept by him as his own property and he paid to the company the premium due in January, 1906—all these payments being made by defendant out of his own money and on his own account.

"Burchard was an intelligent and bright man, but had overtraded himself in business and been unfortunate in his investments. His investments were in the form of expensive improvements on real estate in Centreville, where he had built expensive brick houses, going in debt for much of their cost and relying upon certain arrangements for rental income, in which he was disappointed. He had given mortgages upon his property and was involved in litigation with his creditors and at the time he approached defendant to sell the policy in question, he had lost all he had, was without credit and practically penniless, and his estate insolvent. He had special need

for money to defray the expenses of a surgical operation made necessary by a burn he had received about a month before by falling in a fainting spell with his head in the fire described in his letters to defendant, copies of which are attached to defendant's answer. He came to Nashville for the purpose of having the operation performed, shortly after the sale of the policy and used for that purpose the money paid him by defendant for the policy and defendant furnished him other money while in Nashville, and the operation was performed.

"Burchard did not die from the effects of the injury above mentioned, but from pulmonary tuberculosis which was contracted or at least developed after the assignment of the policy to defendant.

"It is admitted that the copy hereto attached and marked B, of the policy No. 230,176 for \$10,000, is a true copy of the original mentioned in the pleadings and may be read in evidence, the original having been by consent of parties surrendered to the company on its payment into court of the proceeds; also that the letters of J. C. Burchard to defendant Grigsby hereto attached and marked C, D, and E, are the originals of the copies attached to defendant's answer, and are in the handwriting of the said Burchard."

As will be seen from the policy, copied on page 29 of the printed record, it was payable to the "executors, administrators, or assigns" of the insured, and from the assignment, copied in the answer at page 18 of the record and also exhibited in the stipulation (page 28), that it was absolute and unconditional, and that a duplicate of the original was immediately sent to and received by the insurance company, which thereafter received the premiums from the assignee. In fact this assignment is averred and recognized by the insurance company in its bill, and it avers that it was preparing and intending to pay the amount of the policy to the assignee when it was notified that claim would be made by the administrators (Rec., p. 2).

It also appears from the stipulation and its exhibits that the policy was issued January 26, 1903; that it had no withdrawal or cash surrender value until after the third premium was paid, which was, at the date of the assignment, past due and unpaid, and that the assignee paid this premium to the company, in addition to the \$100 paid to the insured; so that, beyond question, the assignee paid full value, and even more than full value, for the policy.

That the entire transaction was in the best of faith was fully recognized in the opinions of both the Circuit Court and Court of Appeals (pp. 39-41 and 49 *et seq.*).

Referring to the facts, the learned Court of Appeals among other things said:

"Upon the personal application of the assured, John C. Burchard, an ordinary life policy was issued to him January 23, 1903. * * * The assured paid two annual premiums. The third fell due January 23, 1905. The assured had in the meantime met with financial misfortune and was unable to meet this premium. He had also incurred a serious injury which necessitated a grave surgical operation, and was without the means to obtain the service needed. In this critical condition he sold and delivered his policy to the defendant in error, receiving for the same \$100.00 in money and the engagement of Dr. Grigsby that he would pay the premium then past due and all future premiums. * * * Dr. Grigsby, the appellee and assignee of the policy, was not related to Mr. Burchard. Neither was he a creditor. He had, therefore, no insurable interest in the life of the assured whatever. * * * The policy was applied for by the assured without any purpose of assigning it. After paying two annual premiums he was driven to sell it for what he could get. This raises the single sharp issue as to whether one who has no insurable interest in the life of an assured is to be protected in his right as assignee of a policy, originally issued in good faith to the assured, beyond the actual amount of his disbursements on account of the transaction" (Rec., pp. 49-50).

Assignments of Error.

I

The Circuit Court of Appeals erred in holding that the sale and assignment of this policy of insurance by the insured to petitioner, under the circumstances revealed in this record, was void.

As your honors will observe, this assignment presents clearly and sharply a single important and far-reaching legal question, that of the *assignability of a life insurance policy, valid at its inception, to one without insurable interest.*

More precisely stated, it is: Whether a life insurance policy, taken out in good faith by the insured, with no idea of assigning it, payable to his "executor, administrator or assigns," can *afterwards*, in good faith, and for a valuable consideration, with the knowledge and assent of the insurer, be sold and assigned to one who has no insurable interest in the life of the insured; and does such assignee, after he has bought a policy, taking an absolute assignment thereof, and in good faith, with the knowledge and consent of the company, pays the subsequent premiums, acquire the right to collect the proceeds of the policy at maturity?

The conflicting decisions upon this question have given rise to two general rules, termed respectively by judges and text writers: (a) The "prevailing" or "majority" rule, holding such assignments valid, and (b) the "minority" rule holding them void.

MINORITY RULE.

The minority rule, as we understand it, is that one who has no insurable interest in the life insured is disqualified from holding a beneficial interest in the death of insured, and hence from *receiving* any valid assignment of an insurance policy contingent on such life, and that such an assignment is void on grounds of public policy; that this is particularly true if the assignee pays the future premiums. The reason assigned being that such assignments encourage murder.

This rule makes no distinction between a policy *taken out in the beginning* on another's life by one without an insurable interest in that life, and an *assignment* of a valid, subsisting policy, taken out originally by one who *has* an insurable interest, and afterward, *in good faith* assigned to one who has not.

MAJORITY RULE.

The "*prevailing*" or "*majority*" rule also holds policies void if *taken out in the beginning* in his own favor by one without insurable interest in the life insured. Likewise, an assignment made as a pretext or subterfuge for the original taking out of a policy on a life in which the nominal assignee, or party beneficially interested from the first, has no insurable interest, is condemned *by both rules*. In the former case the policy is generally termed a "wager policy;" in the latter "a cover for a wager policy" and both are condemned by all the cases. *Thus far the two rules agree.*

The single, sharp and well-defined distinction between the two rules is to be found in those cases in which a policy is *procured honestly and in good faith* by either the insured himself, or one who has the requisite insurable interest, with no intention of assigning it, but who *afterwards* assigns it in good faith, with the insurer's assent, to one who has no insurable interest. This is the only point of divergence.

As we have already stated, the "minority" rule holds such an assignment void.

The "majority" rule holds that the policy when validly issued at the outset, becomes a valid contract, a chose in action, and a thing of value in the hands of its owner, which public policy demands he should be permitted to use as he pleases, to the same extent that he may any other property; and, that in accordance with that principle, its owner may sell it or pledge it, just as any other chose in action.

It is occasionally considered material if the assignee pays the premiums, subsequent to the assignment, and therefore, the distinction may perhaps be best illustrated by the *paid-up policy*, where nothing further remains to be done to keep it alive. By the "minority" rule such a policy is not assignable to one without insurable interest; by the "majority" rule, it is assignable to any one to whom the beneficiary chooses to sell it.

Having stated the sharp distinction between these two rules, we will now inquire which of these rules this court has sanctioned, if either.

THE POSITION OF THE UNITED STATES SUPREME COURT.

Every case involving *assignments*, heretofore presented to this court, has been within the zone of agreement of both rules. No case in this court has ever called for a decision of the controverted question or point of difference between these rules. The case at bar, *for the first time*, presents to this court this exact point of divergence.

The expressions in this court upon this question, and its decisions of analogous principles, are confusing, to such an extent that this great court has been cited both ways by text writers and in the decisions of other courts.

For instance, the Circuit Court of Appeals of the Eighth Circuit was called upon to decide the issue involved in the

case at bar, in the case of *Gordon vs. Ware National Bank*, 132 Fed. Rep., 444-450.

In this case the court, speaking through Judge Sanborn, with whom Judge Amidon and Judge, now Mr. Justice, Van Devanter, concurred, holds that the pledgee of a policy of life insurance has the power and right to sell the policy to the highest bidder for the purpose of realizing money to pay the debt which it secures, and that both immediate and remote assignees, under such a sale, take a good title to the policy and to its proceeds, although they have no insurable interest in the life insured by the policy.

In the course of the opinion, after citing a number of cases holding the so-called "minority" rule, the learned judge says:

"The rule adopted by these States greatly detracts from the value of life insurance policies, and restricts their commercial value; for, if their possible purchasers are limited to those who have insurable interests in the lives they insure, it is obvious that buyers will be few, and their commercial value, and the traffic in them, must be much less than if all men may become their lawful purchasers. In view of this fact, the Supreme Court of the United States, and the courts of the great commercial communities of this country—of New York, Ohio, Massachusetts, Illinois, Michigan, New Jersey, California, Minnesota, Connecticut, Louisiana, Rhode Island, Wisconsin, Nebraska, Tennessee, South Carolina, Mississippi, and Maryland—have repudiated the old doctrine of the Supreme Court of Indiana, and have adopted the more modern and rational rule that 'Any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy.'"

Then follows a long list of cases supporting this text, and the learned judge continues:

"The provision of the bankrupt law of 1898 that an insurance policy held by a bankrupt shall pass

to his trustee as assets of his estate, unless he pays to the trustee the surrender value of the policy, demonstrates the fact that the National Congress deemed the rule adopted by the Supreme Court, and by the courts of these States, the established law of the nation. The courts of Indiana themselves, the courts in which the opposite rule seems to have taken its rise, have lately repudiated it, have followed the trend of the more modern decisions, have adopted the more liberal rule, and have declared that: 'When the person himself, in good faith, makes the contract, procures the insurance on his own life, and pays the premiums, it is immaterial whether the beneficiary designated by him, or the assignee of the policy, has any insurable interest in the life of the insured or not. This doctrine is settled by this court, and is in accordance with the decided weight of the authority.' *Millner vs. Bowman*, 119 Ind., 448; 5 L. R. A., 95.

"This is a great commercial nation. The policy of the nation, the business habits and acts of its citizens, and the tendency of the decisions of its courts, are to depart more and more from the old rule that choses in action are not assignable, to make them more and more the subjects of traffic and of commerce, and to sustain their transfers in the ordinary course of business. The stronger reasons, the decided trend of the decisions of the courts, and the great weight of authority, concur to establish the rule that an insurable interest in the assignee of a policy of life insurance is not essential to the validity of the assignment, if the party to whom it was originally issued had such an interest, and the assignment is not made as a cover for the issue of a wager policy."

It will be seen that in the above opinion the Court of Appeals of the Eighth Circuit has unqualifiedly endorsed the "majority" rule, and that the Supreme Court* of the United States is classed as favoring this rule.

RULE IN THE FIFTH CIRCUIT.

The Circuit Court of Appeals for the Fifth Circuit has followed the so-called "minority" rule. Its holding to this effect is presented in the case of

Alexander vs. Lane et al., Mem. Decision, 157 Fed. Rep., 1002.

In this memorandum decision it was stated by the court that the decree of the circuit court in the case styled, in the court below, *Mutual Life Insurance Co. vs. Lane*, 151 Fed. Rep., 276-290, was affirmed on the authority of *Warnock vs. Davis*, 104 U. S., 775, and *Manhattan Life Insurance Co. vs. Hennessey*, 99 Fed. Rep., 70; 39 C. C. A., 625. When we examine the holding of the circuit court (151 Fed. Rep., 276), affirmed in this case by the Circuit Court of Appeals of the Fifth Circuit, we find that District Judge Speer, in a lengthy opinion reviewing the authorities generally and the decisions of this court, unqualifiedly decides that the so-called "minority" rule is the law; and the learned judge takes the view that the expressions contained in the decisions of the Supreme Court of the United States favor what we have termed the "minority" rule, which declares against the validity of such an assignment of life insurance, thus construing the opinions of this honorable court exactly opposite from the construction placed upon them by Judge Sanborn in the case from the eighth circuit above quoted.

And the uncertainty as to the rule to be applied with reference to such assignments of insurance was noted in an expression used by the Circuit Court for the Eastern District of Pennsylvania in the case of

Clark vs. Equitable Life Assurance Society, 143 Fed. Rep., 176.

In this case, after noting that by the decisions of the New York courts such an assignment would be valid, while by

the decisions of the Pennsylvania courts such an assignment would be void, the court said:

"What the rule in the Federal courts is, may perhaps admit of question, etc."

RULE IN THE SIXTH CIRCUIT.

In the case at bar the Circuit Court of Appeals for the Sixth Circuit follows the so-called "minority" rule, and holds such an assignment void. Judge Lurton, speaking for the Court of Appeals, stated the question involved in this case, and noted the divergence of authority with reference thereto, as follows:

"Coming, then, to the validity of an assignment of a policy of life insurance, applied for and carried in good faith by the assured, and transferred as a matter of financial necessity to a person having no insurable interest in the life of the assured, we are compelled to confess that there is a hopeless division between the decisions of the courts which have directly passed upon the question. The view taken by perhaps a decided majority of the State courts is that in such circumstances an assignment should be upheld as serving to give a greater sale value to such instruments by widening the class of possible purchasers, and that public policy is best subserved by upholding the commercial character of such contracts when there has been no connection between the assignee and the inception of the contract of insurance. Among the opinions which upholds this view we may cite: *Mutual Ins. Co. vs. Allen*, 138 Mass., 564; *Rylander vs. Allen*, 125 Ga., 206, and *Olmstead vs. Keyes*, 85 N. Y., 593.

"Among the cases holding that such assignments to one having no insurable interest in the assured are contrary to public policy may be cited: *Downy vs. Hoffer*, 110 Pa. St., 109; *Helmetag's Admr. vs. Miller*, 76 Ala., 183; *Life Ins. Co. vs. Sturges*, 18 Kan., 93; *Franklin Ins. Co. vs. Hazzard*, 41 Ind., 116, etc."

(Tr., p. 57.)

And then the learned judge agrees with Judge Speer and the Court of Appeals of the Fifth Circuit, and differs with Judge Sanborn and the Court of Appeals of the Eighth Circuit, in the view he takes of the rule that is favored by the Supreme Court of the United States. With respect to this he says:

"The decisions by the Supreme Court of the United States, curiously enough, are cited by learned counsel for both views of the question, and, what is still more odd, are cited in more than one opinion as authority for antagonistic conclusions. This is a misapprehension due to a casual examination, for there can be no doubt that the plain trend of opinion in that court has been in the direction of requiring any claimant to the proceeds of a policy to show an interest in the life of the assured. In order of time, the cases in that court are as follows: *Cammack vs. Lewis*, 15 Wall., 643; *Conn. Mutual Ins. Co. vs. Schaefer*, 94 U. S., 457; *Etna Life Ins. Co. vs. France*, 94 U. S., 561; *Warnock vs. Davis*, 104 U. S., 775; *New York Mutual Ins. Co. vs. Armstrong*, 117 U. S., 597; *Crotty vs. Insurance Co.*, 144 U. S., 621."

(Tr., p. 58.)

It will be noticed that in the case at bar the learned Court of Appeals does not declare that this question has ever been directly passed upon by this court, but only that the "trend of opinion" in this court "has been in the direction of requiring any claimant to the proceeds of the policy to show an interest in the life of the assured."

Conflicting Views of Courts and Text-Writers With Respect to the "Trend" of the Decisions of the Supreme Court of the United States.

As above noted, the Circuit Courts of Appeals have completely and emphatically differed upon the "trend" of the decisions of this court with respect to the assignability of

life insurance to one who, for value and in good faith, takes the assignment, but has no insurable interest in the life insured. And in the case at bar Circuit Judge Lurton announces that this "misapprehension" as to the trend of the decisions of the Supreme Court is "due to a casual examination" of these decisions.

With all deference, we respectfully submit that this view of the learned circuit judge is erroneous. It is unquestionably true that many of the learned text-writers of the country and many of the learned judges of the courts of last resort in the several States, after the most careful analysis of the opinions of this court in the light of the facts involved, have classed them as favoring the assignability of life insurance under the circumstances indicated; and the views expressed by these authorities, we submit, have not been after a "casual examination," as the learned circuit judge suggests, but have been deliberately expressed by these learned authorities, after most exact and careful analyses of such opinions and facts.

For the convenience of the court we give brief statements of the facts and quotations from several of the cases and text-writers, showing that this is true.

In *Clark vs. Allen*, 11 R. I., 439; 23 Am. Re., 496, the action was for money had and received by the widow of an insured against an assignee of the policy, the assignee having collected the money from the insurance company under the assignment. The policy had been taken out and carried for some time by the insured, when he sold and transferred it to the assignee for \$125, estimated to be about the surrender value of the policy at the time, the face of the policy being \$2,000, and the assignee having no insurable interest in his life. The assignee was to pay the subsequent premiums, and did pay five quarterly premiums of \$25 each, when the insured died. The opinion of the court was delivered by Chief Justice Durfee, who, after stating that there was great conflict of decision upon the question involved, proceeds as follows:

"We think the assignment was valid. A life policy is a chose in action, a species of property, which the holder may, for perfectly good and innocent reasons, wish to dispose of. He should be allowed to do so unless the law clearly forbids it. It is said that such an assignment, if permitted, may be used to circumvent the law. That is true, if insurance without interest is unlawful; but it does not follow that such an assignment is not to be permitted at all, because if permitted it may be abused. Let the abuse, not the *bona fide* use, be condemned and defeated. It is not claimed that the parties to the assignment here in question had any design to circumvent or evade the law. Perhaps *Cammack vs. Lewis*, 15 Wall., 243, *supra*, may be a case of that kind. Again, the assignment is said to be a gambling transaction, a mere bet or wager upon the chances of human life. But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal chose in action may be transferred, from the holder to a *bona fide* purchaser. It is true there is an element of chance and uncertainty in the transaction; but so there is when a man takes a transfer of an annuity or buys a life estate, or an estate in remainder after the life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void on that account. But finally it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation. It has been decided, too, that a policy effected by a creditor on the life of his debtor does not expire when the debt is paid, though the holder then ceases to be interested in the continuance of the life, and is thereafter exposed to the same temptation which is supposed to beset the assignee without interest, to bring it to an end. (Citing cases.)

"If the danger is not sufficient to avoid the policy when the interest ceases, why should it be sufficient to

avoid the assignment to an assignee without interest? The truth is, it is one thing to say a man may take insurance upon the life of another for no purpose except as a speculation or bet on his chance of living, and may repeat the act *ad libitum*, and quite another thing to say that he may purchase the policy, as a matter of business; after it has once been duly issued under the sanction of the law, and is, therefore, an existing chose in action or right of property, which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase, in our opinion, no immorality, and no imminent peril to human life. We should have strong reasons before we hold that a man shall not dispose of his own. Courts of justice, while they uphold the great and universally recognized interests of society, ought, nevertheless, to be cautious about making their own notions of public policy the criterion of legality, lest under the semblance of declaring the law they in fact usurp the functions of legislation. *Hilton vs. Eskerley*, 6 El. & B., 47, 64.

"We therefore decide that whatever the law of this State may be in regard to procuring insurance upon the life of another without any interest in the life insured, it does not forbid the sale and assignment of a valid policy which is already in existence, to an assignee without interest in the life insured, when the assignment is permitted, or not prohibited by the policy, and is made, not as a contrivance to circumvent the law, but as an honest and *bona fide* business transaction."

In *Chamberlain vs. Butler* (Nebraska, May 22, 1901), 54 L. R. A., 338, the Supreme Court of Nebraska had before it the question of the assignment of a life insurance policy made in good faith, and under the circumstances presented in the case at bar. The assignment was upheld in an opinion delivered by the chief justice of the court, after a critical review of the authorities, and a careful analysis of the "trend of decision" in the Supreme Court of the United States. In the course of its opinion the court said:

"We are aware that there is a sharp conflict of authorities in the several American courts relative to the validity of a sale of a life insurance policy by one having an insurable interest to one not having such interest. In all the States, perhaps, it is held against public policy for one not having an insurable interest to procure insurance upon the life of another, even though it be with the consent of such person. In some of the States it is held against public policy for one who has taken out insurance upon his own life to transfer it to one having no insurable interest. In some of the States such a transaction is prohibited by express legislative enactment. But the question to be decided here is, assuming that Chamberlain had no such interest in the life of Butler, could he legally buy the policy in question, such policy in its inception having been valid, and taken out in good faith by Butler with no intention or design on his part of assigning it subsequently to Chamberlain? Those courts which hold such transactions void, proceed on the ground of public policy. Originally, at common law, choses in action that were assignable were exceedingly few, but the tendency is now reversed and those not assignable are the exception rather than the rule. The modern policy being, then, as above stated, the reason for a rule contrary to such tendency should be exceedingly strong before a court, where the question is yet unsettled, should adopt a contrary rule in any given case. While public policy is a salutary thing, it has its limitations and dangers. Among them is the fact that it is an exceedingly indefinite term, has no lines of definite demarkation, and may readily lend its aid to a court anxious to make a good case rather than a safe precedent. For that reason, before a case is decided upon that ground solely, courts should be very sure that the reasons for so doing are clear, strong, and admit of no doubt concerning their reasonableness or applicability. Now, the principal reason for branding assignments of this nature as inimical to sound public policy is that the interest of a stranger in the death of an assured is so strong as to tempt to murder of the latter, the earlier to participate in the avails of the policy. Such interest doubtless tends to such a desire. But the same

desire would exist on the part of a creditor who has an insurable interest, or of one who advances money on the policy, where his only hope of reimbursing himself for the loan might be the policy. It is exceedingly doubtful if strangers are any more apt to either desire or seek to accomplish the death of others than are those nearly related to them. The strength of this desire, where it exists, depends not so much upon the consanguinity of the parties as upon the moral stamina of him who holds the expectancy, be that expectancy an insurance policy, a devise, a remainder, or other acquisition which may not be had until the death of another. Another reason sometimes assigned for holding such assignments illegal is that an assignee having no insurable interest is in the position of one who, in the first instance, takes out a wager policy. But we think not. If an insurable interest exists in the beneficiary at the time the policy is issued, and it is taken out in good faith, the object and purpose of the rule against wager policies would seem to have been sufficiently attained, and there is no more reason to apply the rule to policies taken out in good faith and afterwards assigned in good faith than there would be were the assured to retain it in his own hands."

The learned court then cites *Warnock vs. Davis*, 104 U. S., 775, stating the facts of that case, and then continues:

"In the opinion Justice Field says: 'The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name.' Under the facts involved in that case the language was proper, for there was collusion between the insured and the party to be benefited by his death by a receipt of the amount above mentioned. But the language is not applicable to this case, for there was no agreement between Butler and Chamberlain at the time the policy was procured that the latter should participate in its avails. The transaction with him was wholly independent of and subsequent to the original one between Butler and the insurance company. If their agreement had existed prior to the issuance of the policy, or con-

temporaneous therewith, then the words quoted would be applicable; otherwise not. That this is the meaning of the words is clear when we read *Ætna Life Ins. Co. vs. France*, 94 U. S., 567, and *Conn. Mut. Life Ins. Co. vs. Schaefer*, 94 U. S., 457. In the *France* case that court lays down the rule applicable to the facts in this case, viz.: That any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy. The intention and good faith of the parties are the governing principles. In the *Schaefer* case, the court held that a life insurance policy originally valid does not cease to be so upon the termination of the assured party's interest in the life insured. It was certainly not intended in the *Warnock* case to overrule or modify either of them. They are not in conflict with that case when the facts are remembered. The language of the court in the *Warnock* case is unfortunately somewhat misleading in several instances, although the ultimate conclusion reached is right."

The opinion closes as follows:

"If such choses in action may be legally sold absolutely, it is plain that more can be realized from them in the day of need than if available only as security for loans. And until it shall be made to appear that in those jurisdictions where such policies are assignable absolutely, crimes committed by such assignees are more frequent than in those where assignments of the nature of the one here involved are illegal, we are of opinion that the reasons for holding such transactions void are insufficient. Chamberlain, then, being under the facts agreed on, the absolute owner of the policy, had the right to transfer it to Crandall and such act was not a conversion of the policy of insurance, for he was entitled to the whole of the proceeds thereof, free from all claims of the plaintiff or the estate of the deceased."

In *Bursinger vs. Bank of Watertown*, 67 Wisc., 76; 58 Am. Rep., 848, the Supreme Court of Wisconsin said:

"There being no question but that the policy was originally obtained for the benefit of a person having an insurable interest in the life of the assured, the policy being upon the life of the assured himself, that the owner of such policy may thereafter lawfully assign the same to another person, with the assent of the insurance company, is sustained by the great weight of authority, and, as we think, by sound principles of law."

Numerous authorities are then cited, and the opinion continues:

"All the cases cited by the learned counsel, in the courts of the United States, were cases where it was evident the original policies were taken out for the benefit of the person to whom they were immediately assigned, and who, in fact, paid the premiums on the policies from the beginning. Taking out the policies in the names of the assignors in those cases was clearly a cover for acquiring a wager policy on the life of the person in whom the person really insured had no insurable interest. * * * It is not an established rule of law that every contract is void which gives the party to it a pecuniary interest in the death of the other party, or of a third person. If that were law, then every conveyance, will, or other instrument which conveyed to another an estate in reversion would be void, as the reversioner is certainly interested in the speedy demise of the person owning the life estate. There would seem to be no greater reason for holding void a sale or assignment of a life insurance policy which has been obtained in good faith by the holder to a third person, with an agreement on his part to pay future premiums and receive the insurance money on the death of the assured, than there would be for holding that a person who held a life estate in real property could not lease such estate for the term of his life to the reversionaries upon the payment of a stipulated annual rent to be paid to the party having the life estate. In that case, the party taking the life lease would have just as much interest in the speedy death of the holder of the life estate as the purchaser of an in-

surance policy upon which annual premiums are to become due has in the death of the assured.

"The mere fact that a person who becomes the purchaser of a life policy may thereby become interested in the speedy death of the person to whom the policy is issued, can be no legal ground for holding such purchase void. In all the decided cases where such assignments have been held void there has also existed the fact that the assignee or purchaser has taken the policy, not in good faith, paying the value thereof, but as a speculation upon the life of the party in whom he has no interest, and so the transaction has been brought within the rule against wagering policies. Nor are we able to perceive why the holder of a valid policy should be prevented from realizing the value of the same to him, before his death, by a *bona fide* sale or assignment thereof. Such sale or assignment may, in fact, be absolutely necessary in order to get any benefit of his policy. The holder may have paid thousands of dollars in premiums through a long series of years and a time may come when he becomes unable to pay the premiums becoming due, and he must either sell his interest in the policy or suffer it to lapse and lose all the premiums paid. Under such circumstances, can there be anything against public policy or the law which prevents the unfortunate holder of the policy from selling the same for the best price he can, and so get some benefit of his previous payments? We think not. The only reason for holding such sale illegal is because it gives the purchaser a pecuniary interest in the speedy death, and as we have seen above, that fact alone has never been held sufficient to render a contract void."

In *Fitzpatrick vs. Insurance Company*, 56 Conn., 116; Am. St. Rep., 288, the court reviews the cases of *Connecticut Mutual Life Insurance Company vs. Schaefer*, and *Insurance Company vs. France*, *supra* and construes these cases as sanctioning the prevailing or "majority" rule, and then continues:

"In the subsequent case of *Warnock vs. Davis*, 104 U. S., 775, the expressions to the effect that the law

permits a transfer only to a person who has an insurable interest in the life of the insured, were doubtlessly occasioned by the belief that the contract under consideration was a wager; for in the case of *New York Mutual Life Insurance Company vs. Armstrong*, 117 *Id.*, 591, Mr. Justice Field, returning to the subject, says:

"A policy of life insurance, without restrictive words, is assignable by the insured for a valuable consideration, equally with any other chose in action, when the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies," citing *Warnock vs. Davis, supra*."

The Supreme Court of Indiana, in *Amick vs. Butler*, 111 *Ind.*, 578; 60 *Am. Reps.*, 722, in which case the court in effect repudiated its previous decision in the case of *Insurance Company vs. Hazard*, 41 *Ind.*, 116; 13 *Am. Reps.*, 813, speaking through Judge Mitchell, says:

"It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money, upon the event of the death of the person whose life is insured, or, *having taken a policy, valid at its inception, that he may in good faith assign his interest in such policy as in any other chose in action.*"

Citing in support of this statement, among other cases, *Insurance Company vs. Armstrong*, 117 *U. S.*, 591, the learned judge then continued:

"In either case, the essential point is that the transaction be *bona fide* and not merely a cover for *obtaining wagering or merely speculative insurance, and a device to evade the law.* *Insurance Company vs. Schaefer*, 94 *U. S.*, 457.

"* * * The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable and a scheme to obtain speculative insurance."

The learned judge then cites—

Insurance Company vs. Hazard, 41 Ind., 116; 13 Am. Reps., 313.

Cammack vs. Lewis, 15 Wall., 643, and

Warnock vs. Davis, 104 U. S., 775,

as cases of that character.

In the later case of *Insurance Company vs. Brown*, 159 Ind., 644 65 N. E., 908, in which an assignment, made under circumstances almost identical with those in the case at bar, was sustained, Judge Gillett, speaking for the court, quoted all the above language with approval.

In the recent case of *Hardy vs. Insurance Company*, 152 N. C., 286, the Supreme Court of North Carolina openly repudiates the "minority" rule to which it had previously adhered, and adopts the "majority" rule, citing, among others, the decisions of this court as its authority.

Hoke, J., speaking for the court, says:

"It is accepted doctrine here and elsewhere that in order to (have) a valid policy of life insurance, there must have existed an insurable interest at the time the contract is entered into, but the question whether such a policy, valid at its inception, can be assigned to one who has no insurable interest, has been very much discussed in the courts, and on this there is some conflict in the cases. We consider it, however, as established by the great weight of authority, that wherever an insurant makes a contract with a company, taking out a policy on his own life for the benefit of himself or his estate generally, or for the benefit of another, the policy being in good faith and valid at its inception, the same may, with the assent of the company, be assigned to one not having an insurable interest in the life of the insured, provided its assignment is in good faith and not a mere cloak or cover for a wagering transaction."

"A decided intimation in favor of this general principle was given by this court in the recent case of *Pollock vs. Household of Ruth*, 150 N. C., 211,

and the position will be found sustained by a large number of authoritative and well-considered decisions, and by text writers of approved excellence. *Insurance Company vs. Armstrong*, 117 U. S., 591; *Connecticut Mutual vs. Schaefer*, 94 U. S., 457; *Crosswell vs. Association*, 52 S. C., 103; *Rylander vs. Allen*, 125 Ga., 206, annotated in 5 A. & E. Annot. cases, 355; *Murphy vs. Red*, 64 Miss., 614; *Mutual Life vs. Allen*, 138 Mass., 24; *Steinback vs. Diepenbrock Err.*, 158 N. Y., 24; *Chamberlain vs. Butler*, 61 Neb., 730; *Moore vs. Guarantee Fund*, 178 Ill., 202; *Prudential Company vs. Liersch*, 122 Mich., 436; *Cooley's Briefs, on Insurance*, vol. I, page 262, *et seq.*; *Vance on Insurance*, I, page 140, *et seq.*"

The learned judge, after quoting briefly from some of the cases cited, adds:

"In several cases where the opinion apparently upholds the contrary view, it will be found that the case was correctly decided and sustainable on the ground that the policy, though taken out in the name of the insured, was procured in pursuance of a scheme and purpose to assign to one having no insurable interest, and that the proposed assignee was cognizant of the arrangement and took part in it.

"This was true in the case of *Warnock vs. Davis*, 104 U. S., 775, and also in *Cammack vs. Lewis*, 15 Wall., 643. In both of these cases the assignees were parties to the arrangement by which the policies were procured and assigned, and having no insurable interest in the life of the insured, the facts disclose, as far as the assignments were concerned, a clear case of wagering contract on the duration of a human life, forbidden by the law, and the assignments were not allowed to stand. Accordingly, we find the same high court, in *Life Insurance Company vs. Armstrong*, *supra*, under a different state of facts, deciding the general principle: 'That a policy of life insurance without restrictive words is assignable by the assured for a valuable consideration, equally with

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any other chose in action, where the assignment is not made to cover a mere speculative risk and thus evade the law against wager policies, and payment thereof may be enforced for the benefit of the assignee, and under the procedure of many States in his name."

In addition to the cases quoted from above, the following text writers and annotators treat or cite the decisions of this honorable court as favoring the "majority" rule, and, in some instances, refer to the decisions of the Federal courts as not being uniform.

Bacon on Benefit Societies and Life Insurance, 2d ed., sec. 302.

Joyce on Insurance, vol. 2, secs. 914-919.

May on Insurance (ed. 1891), sec. 398a.

Vance on Insurance (ed. 1904), page 140.

Cyc. Law & Procedure, vol. 25, page 709.

Am. & Eng. Encyc. of Law, 2d ed., vol. III, page 1025.

Crosswell vs. Insurance Company, 51 S. C., 103; 28 S. E., 200.

Merchants' National Bank vs. Comins (N. H.), 101; Am. St. Reps., 657.

Steinback vs. Diepenbrock, per Judge Parker (N. Y.), 44 L. R. A., 417.

See also note by Judge Freeman to the case reported in 87 Am. St. Reps., 507.

So it will appear, we submit, that many of the learned text writers and courts of last resort, in the several States, after the most careful and painstaking analyses, agree with Judge Sanborn and the Court of Appeals of the Eighth Circuit in construing the expressions and decisions of this court as favoring the "majority" rule which the Court of Appeals in the case at bar declined to follow.

Decisions of the United States Supreme Court.

Before going to the cases in this court which have been heretofore referred to in this case, we wish to call attention to the previous case of *Phoenix Mutual Life Insurance Company vs. Bailey*, 13 Wall., 616 (1871), declaring a principle now well settled, which has a material bearing on the question here involved. That case did not involve any question of assignment, but it declared the important principle that a life insurance contract, unlike contracts for marine and fire insurance, is not merely one of *indemnity*, but is a specific contract upon consideration of the payment of certain premiums to pay a *fixed sum in future* upon the *happening of a certain event*, and therefore that it is only necessary to make the contract valid that the insured party have an insurable interest in the life insured at the inception of the contract,—and not necessary that that interest shall continue to the happening of the event which matures the contract.

Said the court in that case (the italics being ours):

“Policies of life insurance are governed, in some respects, by different rules of construction from those applied by the courts in cases of policies against marine risks or policies against loss by fire.

“Marine and fire policies are contracts of *indemnity* by which the claim of the insured is *commensurate with the damages he sustains* by the loss of, or injury to the *property insured*. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defense to an action on the policy, as the insured cannot justly claim *indemnity* for the loss of, or injury to, property *in which he had no insurable interest at the time the loss or injury occurred*.

“Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui qui vie* are founded

in an erroneous view of the nature of the contract, that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies, that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured.

"Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies."

It must be obvious that this principle, which since this decision has become the settled law of this country, except that the rule of *indemnity* is still sometimes applied to life insurance effected by a creditor upon the life of his debtor for the sole purpose of security, is consistent with and supports the "majority" rule as to assignments of life insurance contracts, and is *inconsistent* with the "minority" rule which necessarily either proceeds upon the principle of *indemnity*, or else *ignores* the manifest consequences flowing from the lawful conditions existing at the inception of the insurance contract.

The cases in this court that have been heretofore invoked by either side are, in chronological order, as follows:

Cammack vs. Lewis, 15 Wall., 643; 21 L. Ed., 244 (1872).

Conn. Mut. Ins. Co., vs. Schaefer, 94 U. S., 457; 24 L. Ed., 251 (1876).

Ætna Life Ins. Co. vs. France, 94 U. S., 561; 24 L. Ed., 287 (1876).

Warnock vs. Davis, 104 U. S., 775; 26 L. Ed., 924 (1881).

New York Mutual Life Ins. Co., vs. Armstrong, 117 U. S., 597; 6 Sup. Ct., 877; 29 L. Ed., 997 (1885).

Crotty vs. Insurance Co., 144 U. S., 621; 12 Sup. Ct., 749 (1892).

Of the cases now to be noticed, those of *Cammack vs. Lewis* and *Warnock vs. Davis* are chiefly relied on by adversaries, but we shall notice them in chronological order.

Cammack vs. Lewis, 15 Wall., 643 (1872):

Appeal from Supreme Court of District of Columbia. Opinion by Mr. Justice Miller.

The facts were: Lewis owed Cammack \$70. The two agreed that a seven-year policy for \$3,000 should be taken out by and in the name of Lewis, and this was done June 19, 1868. Cammack paid the first premium, and immediately after the policy was made out Lewis gave Cammack a note for \$3,000 for which there was no consideration, and assigned the policy to him. On September 15, 1868, Cammack signed a paper binding himself to pay the wife of Lewis \$1,000 in the event of Lewis' death, and the collection of the policy by him, Cammack. Lewis died January 9, 1869, before any other but the first premium was paid. Cammack collected the policy, and settled with the widow on the basis of the paper of September 15. Afterwards the widow, having been appointed administratrix of her husband, sued Cammack to recover the balance of the proceeds of the policy, alleging her ignorance of the facts and of her rights at the previous settlement. Cammack set up by way of defense "that the policy was taken out under an agreement between Lewis and himself that he should pay the premiums for the seven years the policy was to run, and in consideration of those

payments, and what Lewis owed him, he should, in the event of Lewis' death during the life of the policy, receive two-thirds of the amount of the policy, and pay over the other third to Lewis' wife or his heirs"—and he relied upon the paper of September 15, in support of this defense, and also on the settlement made with Mrs. Lewis on that basis.

"But," says the report of the case, "the defense was not sustained, and the court below, *holding that Cammack held the policy as a mere security for what Lewis owed him*, decreed that he should pay over the balance after deducting that small sum. From that decree Cammack appealed."

This decree was *affirmed* in a short opinion by Mr. Justice Miller, citing no authorities at all. All that it does over or beyond a simple affirmance of the decree below—which treated the assignment as not absolute but as for security merely—was to say that the defense, if established, would not change the result, as it would be a fraudulent arrangement made at the inception of the insurance which the insurance company might probably have relied on, but as between the parties would only have entitled Cammack to retain his debt and advances.

The insurer was not a party, having paid the policy, and there was, consequently, no question of its liability on the policy. The discussion, in the opinion, of the extent of Lewis' participation in the fraud of Cammack at the time the policy was applied for and issued, was evidently on the point whether his participation was such as should repel his personal representative from the court; it could have no other bearing.

There is nothing in the case as we read it, which even squints at committing the court to the "minority" rule on the assignability of life insurance. It rather presents a case of *collusive assignment*, made pursuant to an understanding at the very *inception of the contract of insurance*—condemned by *all* the cases irrespective of their position on the conflicting rules.

Conn. Mut. Ins. Co. vs. Schaffer, 94 U. S., 457
(1876):

From U. S. Circuit Court, Southern District of Ohio.
Opinion by Mr. Justice Bradley.

The facts were: A policy was obtained on the joint lives of husband and wife, payable to the survivor on the death of either; the husband and wife were subsequently divorced, *a vinculo*; they both afterwards married again, the husband another wife and the wife another husband; the wife retained the policy and paid the subsequent premiums until her first husband's death; she then sued the company on the policy, and the company defended on the ground of want of insurable interest in the plaintiff after the divorce and at the date of the death.

The plaintiff recovered. The court, among other things, said:

"The essential thing is, that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. * * *

"The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, *that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy itself.* Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

"But supposing a fair and proper insurable interest,

of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms." (Italics ours.)

There was no question of assignment of the policy involved in the case, it is true; but most manifestly the principle which will sustain a policy *after the interest of the beneficiary in the life of the insured has wholly ceased* will sustain an assignment of the same policy to one who has, at the time, no such interest, and we shall see that the same learned court has since cited this case as sustaining such assignment of a policy lawful and valid at its inception. See *Insurance Company vs. France, infra*.

Moreover, the opinion contains a vigorous endorsement of Baron Parke's judgment in *Dalby vs. Insurance Company* (1854), 15 C. B., 365; 13 Eng. Ruling Cases, 382, overruling *Godsall vs. Boldero*, 9 East, 72, decided by Lord Ellenborough, in 1807, upon certain policies on the life of Mr. Pitt, and referred to at some length in the opinion of the Court of Appeals in this case. That endorsement, in effect, reiterates and emphasizes the holding in *Insurance Company vs. Bailey*, 13 Wall., 616, that life insurance *is not a contract of indemnity*, and this principle is really the basis of the decision in this Schaefer case; but, in view of this fact, since our present quest is to ascertain what this court has really meant by its decisions up to this time, it may not be amiss to digress at this point sufficiently to get a clear idea of Baron Parke's decision and the insurance act of 14 Geo. III, chapter 48 (1774), which it construed.

The Dalby case is reported in 13 Eng. Ruling Cases, 382, under the following "rule" there cited.

"RULE. A contract of life insurance is not, in its essence, a contract of indemnity, and the person effecting such a contract may recover upon it so far

as it does not contravene the provisions of the act of 14 Geo. III, chapter 48. If the person effecting the policy has an interest at the time of effecting it, it is immaterial that the interest has determined before the amount assured becomes due."

The plaintiff was the Anchor Life Insurance Company, suing through Dalby, its trustee, and the defendant was the India & London Life Assurance Company. The facts were: One Wright had taken out four policies in the plaintiff company on the life of the Duke of Cambridge, aggregating three thousand pounds, in his own favor. The plaintiff company, in order to reduce its risk, afterwards took out a policy in the defendant company on the life of the Duke in the sum of one thousand pounds, payable to itself, and the suit was on this latter policy. Subsequent to the issuance of the policy sued on, Wright gave up his policies in the plaintiff company and they were canceled, during the life of the Duke, the company agreeing, for certain premiums and the cancellation of these policies, to pay him an annuity during the life of his wife. The plaintiff company continued to pay the premiums to the defendant company on the policy for one thousand pounds until the Duke's death, when it sued. The case was therefore one of reinsurance where the risk insured against terminated before the maturity of the reinsurance, and the court treated it as one where the interest supporting the policy at the time of its issuance had wholly terminated during the life of the insured and the policy been thereafter kept up by one *having no interest in the life*.

The question was whether such termination of interest prevented a collection of the policy, and this depended upon the proper construction of the act of 14 Geo. III.

The arguments of Mr. Bramwell, for the plaintiff, and Sergeant Channell, for the defendant, are clear and forceful, and quite as well deserve to be characterized as lucid as the final judgment of the learned Baron Parke, so characterized by Mr. Justice Bradley in the Schaefer case. There can be no

reasonable doubt, we think, that Mr. Justice Bradley and the other members of this court, for whom he spoke, fully approved both the reasoning and conclusions of the learned Baron Parke with all their logical and obvious consequences.

As was stated by Mr. Bramwell: "A policy on the life of another *without interest* was good at common law," and "the only difference made by the statute of 14 Geo. III, chapter 48, is that there must be an interest *at the time of effecting the policy*."

"The object of the act was, as stated in the preamble, *to prevent mischievous gaming*" (13 Eng. Ruling Cases, 385).

Mr. Bramwell further said, in argument (and the court proved the point):

"The true effect of section 3 is that the insured shall not recover more than the amount of his interest *at the time of effecting the policy*. If it applies to any other time, this would follow: That a man might make a *wagering policy*, contrary to the policy of the act, *without any existing interest* and that if afterwards he gained an interest, he might recover to the full amount of his interest. Or, on the other hand, if the office paid the amount on the death of the debtor, whose life was insured, it might recover back the amount from the creditor, without returning the premiums, if the debtor's estate some time afterwards satisfied the claim. * * * If a man insures the life of his debtor, and sells the policy, no one has ventured to say that the title of the assignee would fail if the interest ceased. * * * *Ashley vs. Ashley*, 3 Sim., 149, is an authority that an assignee need not have an interest." *Id.*, 386.

He vigorously attacked *Godsall vs. Boldero* in his opening argument, and, in reply to Sergeant Channell on that point, said:

"It is conceded by the argument for the defendant that *Godsall vs. Boldero* cannot be supported on the reasons given by Lord Ellenborough. That is, in fact, giving up the authority of that case. But it is attempted to support the decision on other grounds

than those used in the judgment, by reading the Statute 14 Geo. III, c. 48, as not only prohibiting some contracts legal before, but as *altering the nature of others which are still legal*; and therefore, that although the present policy *was a legal bargain to pay one thousand pounds, the plaintiff can recover nothing*. There is nothing in the statute to warrant such an interpretation." *Id.*, 387.

And so *all* the judges of the court of exchequer, Barons Parke, Alderson and Platt, and Judges Wighman, Erle and Crowder concurred.

The learned Baron, after stating the pleadings and facts and the question whether the interest existing at the date of the policy was sufficient to sustain the action, said:

"We are all of opinion that it was sufficient, and but for the case of *Godsall vs. Boldero* should have felt no doubt upon the question. The contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life; the amount of the annuity being calculated in the first instance according to the probable duration of the life, and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in event of death is always (except where bonuses have been given by prosperous offices) the same on the other. Those species of insurance against fire and against marine risks are both properly contracts of indemnity; the insurer engaging to make good, within certain limited amounts, the losses sustained by the assured in their buildings, ships and effects. Policies on maritime risks were afterwards used improperly, and made mere wagers on the happenings of those perils. This practice was limited by 19 Geo. II, c. 37, and put an end to in all except a few cases. But at common law, before this statute, with respect to maritime risks and the 14 Geo. III, c. 48, as to insurance on lives, it is perfectly clear that all contracts for

wager-policies, and wagers, which were not contrary to the policy of the law, were legal contracts; and so it is stated by the court, in the report of *Cousins vs. Nantes*, to have been solemnly determined in the case of *Lucena vs. Craufurd*, 2 Bos. and P. (N. R., 269, p. 151, *ante*), without even a difference of opinion among the judges. To the like effect was the decision of the Court of Error in Ireland, before all the judges except three, in *Schweiger vs. Magee*, that the insurance was legal at common law. The contract, therefore, in this case to pay a fixed sum of £1,000 on the death of the late Duke of Cambridge would have been unquestionably legal at common law, if the plaintiff had an interest therein or not; and the sole question is, whether this policy was rendered illegal and void by the provisions of the statute 14 Geo. III, c. 48. This depends upon its true construction. The statute recites that the making insurances on lives and other events, wherein the assured shall have no interest, hath induced a mischievous kind of gaming, and for the remedy thereof it enacts, 'that no insurance shall be made by any one on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose benefit, or on whose account such policy shall be made shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning thereof shall be null and void to all intents and purposes whatsoever.' As the Anchor Insurance Company had undoubtedly an interest in the continuance of the life of the Duke of Cambridge, and that to the amount of £1,000, because they had bound themselves to pay a sum of £1,000 to Mr. Wright on that event, the policy effected by them with the defendants was certainly legal and valid; and the plaintiff, without the slightest doubt, could have recovered the full amount if there were no other provisions in the act. This contract is good at common law, and certainly not voided by the first clause of the 14th Geo. III, c. 48. This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be

voided. The question arises on the third clause. It is as follows:—‘And be it further enacted, that in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers, than the amount or value of the interest of the insured in such life or lives or other event or events.’”

Without quoting in full the Baron’s language, he reaches the conclusions contended for by plaintiff’s counsel, and then says:

“This construction is effected by reading the word ‘hath’ as referring to the time of effecting the policy. By the first section the assured is prohibited from effecting an insurance on a life, or on an event, wherein he ‘shall have’ no interest. That is, at the time of assuring; and then, the 3d section requires that he shall recover only the interest that he ‘hath;’ if he has an interest when the policy is made he is not wagering or gaming, and the prohibition of the statute does not apply to his case.”

Answering the argument of Mr. Serg. Channell, for the defendant, it is then said:

“On the other hand, the defendants contend that the meaning of this clause is, that he shall recover no more than the value of the interest which he has at the time of the recovery, or receive more than its value at the time of the receipt. The words must be altered materially to limit the sum to be recovered to the value at the time of the death, or, if payable at a time after death, then when the cause of action accrues. But there is a most serious objection to any of these constructions. It is that a written contract, which, for the reasons given before, is not a wagering contract, but a valid one, permitted by the statute, and very clear in its language, is by this mode of construction completely altered in its terms and effect. It is no longer a contract to pay a certain sum on the value of a then existing interest in an event or death, in consideration of a fixed an-

nuity calculated with reference to that sum, but a contract to pay, contrary to its express words, a varying sum according to the alteration of the value of that interest at the time of the death, or the accrual of the cause of action, at the time of the verdict or execution; and yet the price or the premium, to be paid, is fixed, calculated on the original value, and is unvarying, so that the assured is pledged to pay a certain premium every year calculated on the value of his interest at the time of the policy, in order to have a right to recover an uncertain sum, namely, that which happens to be the value of the interest at the time of the death, or afterward, or at the time of the verdict. He has not, therefore, a sum certain which he stipulated for and bought with the certain annuity, but it may be a much less sum or even none at all. This seems to us so contrary to justice and fair dealing and common honesty, that this construction cannot, we think, be put upon the section. We should, therefore, have no hesitation, if the question were *res integra*, in putting the much more reasonable construction on the statute, that if there is an interest at the time of the policy, it is not a wagering policy, and the true value of that interest may be recovered in exact conformity with the words of the contract itself. The only effect of the statute is, to make the assured value his interest at its true amount when he makes the contract."

The case of *Godsall vs. Boldero* is then discussed at some length and overruled with the result that the action was held maintainable.

Now, Mr. Justice Bradley, speaking for this court in the Schaefer case, refers to this judgment of Baron Parke as a "lucid judgment," states the effect of it, and adds:

"The word 'hath' (in the statute) was construed as necessarily referring to the time of effecting the insurance, and not to the time of the death, that being the only construction which would subserve the object of the statute to discourage wagering, render the contract uniform and certain and preserve a fixed

relation between the premiums and the amount insured, as required by the principles of life insurance."

And he concludes with these words:

"As thus interpreted, we might almost regard the English statute as declaratory of the original law, and as *indicating the proper rule to be observed in this country*, where that law furnishes the only rule of decision.

"Be this, however, as it may, in our judgment a life policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured." (Italics are ours.)

Now, in the next case to be noticed, *Insurance Company vs. France*, same volume (94 U. S., 561), in which the opinion was also delivered by Mr. Justice Bradley, the learned justice refers to the Schaefer case as having covered *assignments* of valid policies, his language being:

"As held by us in the case of *Connecticut Mutual Life Insurance Company vs. Schaefer*, *supra*, page 457, any person has a right to procure an insurance on his own life *and to assign it to another*, provided it be not done *by way of cover for a wager policy*.
* * * The direction of payment in the policy itself is *equivalent to such an assignment*."

The learned justice did not refer to nor have in mind, evidently, a *wager assignment* or a *cover for a wager assignment*, but a *wager policy*. The right to *assign* was declared, unless the assignment be resorted to by way of cover for a *wager policy*—a thing condemned equally by both the "majority" and the "minority" rules.

It is impossible to read and study the opinions in *Insurance Company vs. Bailey*, 13 Wallace; *Cammack vs. Lewis*, 15 Wallace, and *Insurance Company vs. Schaefer*, 94 U. S., in the light of the English statute and Baron Parke's judgment in *Dalby vs. Insurance Company*, 13 English Ruling

Cases, and in the light of the reference to the Schaefer case in the France case, in the same volume, without feeling that this court, at least up to this stage, has fully committed itself to the doctrine of the "majority" rule, resulting, *necessarily*, at least in England, from the acceptance of the Dalby case.

It may be briefly noted in passing, as we shall come to the subject again, that the idea upon which the case holding the minority rule proceed, namely, the subsisting motive or inducement to end the life of the insured where the beneficiary or assignee has no interest in that life, has no place in either the common law or the statute of 14 George III.; but the sole idea there—in certain cases of the common law and in insurance cases under the statute—was to discourage *wagering contracts*. The fear of punishment for murder was deemed sufficient to deter from that sort of crimes. It remained for the Indiana court, as late as 1872, to discover that ground for avoiding assignments in the case of *Franklin Insurance Company vs. Hazzard*, 41 Indiana, 116, long since repudiated and abandoned not only by the State where it originated, but by several other States which followed it for a brief period. We will deal further on this point, in its proper place.

Ætna Life Ins. Co. vs. France, 94 U. S., 561 (decided in 1876):

From U. S. Circuit Court, Eastern District of Pennsylvania; opinion by Mr. Justice Bradley.

The facts were: A policy in the sum of \$10,000 was issued upon the life of one Chew, payable to his married sister, Mrs. France, a lady of wealth not dependent upon her brother, a comparatively poor man earning his living as a shoemaker, for her support; upon the death of Chew, Mrs. France and her husband brought suit upon the policy; the company insisted the policy was void for want of insurable interest in the beneficiary. The plaintiffs recovered.

The court construed the policy as one obtained by Chew for the benefit of his sister, and, there being some question as to whether the brother or the sister paid the premiums, held that it made no difference which paid them.

Among other things the court said:

"As held by us in the case of the *Connecticut Mutual Life Insurance Company vs. Schaefer, supra*, p. 457, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. *The direction of payment in the policy itself is equivalent to such an assignment.*" (The italics are ours.)

There was a request in the court below for an instruction to the effect that if Mrs. France paid the premiums she must show an insurable interest beyond that of mere relationship before she could recover, which was refused.

This was held without error, on two grounds: (1) because the policy and premium receipts showed it was the brother's contract and that he paid the premiums, and the company was estopped from denying this fact, and (2) because by reason of the relationship of the insured and beneficiary it was wholly immaterial what arrangement they made between themselves for payment of premiums—that such relationship rebutted the idea that it was a wager policy, such as the law condemns. (See pp. 564-5 of opinion—too long to quote.)

The court did not hold that the relationship of brother and sister, merely, constituted a sufficient "insurable interest" in the sister to sustain a policy taken out by her on her brother's life; but, treating the policy as the brother's contract, held that it made no difference if the sister did pay the premiums.

The case goes much further than any of the others we have cited in sustaining *the principle* on which we rely, namely, that one who honestly procures insurance upon his own life may make it payable to whomsoever he pleases or assign it to whosoever he pleases. And, it will be observed, the court cites the previous case of *Ins. Co. vs. Schaefer*, decided at same term, *as establishing these very propositions*.

Both of the above opinions, in 94 U. S., are *unanimous* opinions of the court, and it must be assumed that Mr. Justice Field, who delivered the opinion next case to be examined, and which was commented on with so much emphasis by the learned Circuit Court of Appeals in the case at bar, concurred in them.

Warnock vs. Davis, 104 U. S., 775 (decided in 1881):

From U. S. Circuit Court, Southern District of Ohio.
Opinion by Mr. Justice Field.

The facts, were: One Crosser, a resident of Kentucky, entered into an agreement with the Scioto Trust Association, a partnership firm, of Portsmouth, Ohio, whereby Crosser was to obtain a policy on his own life for \$5,000, payable to himself, and transfer nine-tenths thereof to the association in consideration of its paying all the premiums; the policy was accordingly obtained and immediately so assigned, and the premiums were paid according to the agreement; upon Crosser's death the association collected the policy and paid to Crosser's widow one-tenth of the proceeds, reserving nine-tenths; thereafter Warnock, administrator of Crosser, sued the association to recover this nine-tenths.

The case was tried below by the court without a jury, and judgment was awarded for the defendants. This judgment was reversed by the Supreme Court, which gave plaintiff a recovery.

The case, as seen from its facts, was a typical one of fraud-

ulent collusion at the inception of the insurance contract, which vitiated the assignment according to all the authorities—those holding to the “majority,” as well as those holding to the “minority” rule—and there is no sort of question that the *right result was reached* by the Supreme Court.

It is true that in the course of the opinion the court said:

“The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name.”

And in the same opinion the court used this language:

“But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not a cogent and operative one against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other, so far at least as to restrict the right of the assignee to the sums actually advanced by him,” etc.

And in this case it is undoubtedly true that the court used other expressions to the effect that there is no difference between a policy taken out originally by one without insurable interest and an assignment to one without such interest; and the learned judge did, apparently, if we look simply to what he said, and without bearing in mind the *facts* about which he was speaking, and which he evidently had in his mind, endorse the “minority” rule.

But his meaning has not been so interpreted by judges and text writers, nor, as we read the case, presently to be cited, has his meaning been so interpreted by the learned judge himself.

Some of the interpretations and analyses of the expressions contained in this opinion have been shown in the previous parts of this brief, and others will be cited at the conclusion of this review.

N. Y. Mut. L. Ins. Co. vs. Armstrong, 117 U. S., 597 (decided in 1885).

From U. S. Circuit Court, Eastern District of New York.
Opinion by Mr. Justice Field.

In this case the insurance policy was issued upon the life of Armstrong and was assigned to Hunter by Armstrong before its actual issuance, and it was claimed that Hunter was a special partner in business with Armstrong and thus had an insurable interest in Armstrong's life. Afterwards Hunter killed Armstrong, and was hung for the offense; and the widow of Armstrong, as his administratrix, brought suit against the insurance company to recover the amount of the policy.

The court, while rejecting the idea, pressed in argument that there had been no assignment to Hunter, considered the case in the two aspects, namely: (1) of a policy obtained originally by a fraudulent and collusive arrangement between the assured and a stranger without insurable interest—holding the whole policy in that view void; and (2) of a policy procured by one who had an insurable interest (for it was claimed Hunter was a special partner in business with Armstrong, and by virtue of this relation had an insurable interest in Armstrong's life), and without reference to any bad motive of Hunter at the time—holding in that view that the policy could not be collected because the life of the assured was feloniously taken by the assignee.

Among other things, after holding that the term "legal

representatives" used in the policy included assignees, the court said:

"A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies; and payment thereof may be enforced for the benefit of the assignee, and, under the system of procedure in many States, in his name. Warnock vs. Davis, 104 U. S., 775, 780; Archibald vs. Mutual Ins. Co. of Chicago, 38 Wis., 542, 545; De Ronge vs. Elliott, 8 C. E. Green (23 N. J. Eq.), 486, 495. The assignee here, Hunter, represented that he was the special partner of Armstrong, and had placed \$5,000 in the partnership, and was apprehensive that he might be charged as a general partner. If he was a special partner the contract was not a wager policy. And as it was not a contract for the benefit of the wife of the assured, it does not fall within those cases where, for the protection of the beneficiary, the power of the assured to divert the course of payment is restricted.

"The assignment conveying to Hunter the whole interest of the assured, his representatives alone would have a valid claim under it, if the policy were not void in its inception. Proof, therefore, that he caused the death of the assured by felonious means must necessarily have defeated a recovery; and the court erred in refusing to admit testimony tending to prove that such was the fact" (p. 597). (The italics are ours.)

And after thus holding as error the exclusion of offered proof that Hunter obtained other and additional insurance on the life of Armstrong under similar circumstances, the learned judge said:

"But, independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate pay-

ment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired" (p. 600).

The judgment against the company was reversed.

It will be noticed that in this case Judge Fields cites the case of *Warnock vs. Davis*, previously decided by him, for the very proposition maintained by the courts which follow the "majority" rule, namely that—

"A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies."

This is Judge Field's own interpretation of his previous decision so much stressed by the learned Court of Appeals in the case at bar.

And it will be observed, in this connection, that Judge Fields cites with approval the cases of *Archibald vs. Mutual Life Ins. Co. of Chicago*, 38 Wis., 542-545, and *De Ronge vs. Elliott*, 8 C. E. Green (23 N. J. Eq.), 486-495, which are cases affirming the "majority" rule.

Crotty vs. Union Mut. L. Ins. Co., 144 U. S., 621 (decided in 1891):

From U. S. Circuit Court, Northern District of California; opinion by Mr. Justice Brewer.

The facts were: A policy of \$10,000 was issued to Michael O'Brien upon his life, payable to him at the end of fifty-eight years, or if he should die within that time, then "to Michael Crotty, his creditor, if living; if not, to the said Michael O'Brien's executors, administrators, or assigns."

The suit was by Crotty upon the policy, who alleged in his complaint, among other things, "that plaintiff was at the time of effecting said policy of insurance, and at the time of the death of said Michael O'Brien, a creditor of said Michael O'Brien for various sums of money which the plaintiff had at various times advanced to the said Michael O'Brien, amounting to several thousand dollars, and as such creditor had a valuable interest in the life of said Michael O'Brien." This averment was denied by the company, and no proof was offered by plaintiff except the policy and proofs of death.

The sole question was whether, upon this issue, thus squarely made, the policy and proofs of death were sufficient evidence to make out the plaintiff's case calling for proof of indebtedness. The trial judge instructed the jury to find for the defendant, and this action of the judge was affirmed.

The learned Court of Appeals, in its opinion in the case at bar, quotes an expression from this opinion, in which, among other things, it is said:

"It is settled law of this court that a claimant under a life insurance *policy* must have an insurable interest in the life of the insured. Wagering contracts in insurance have been repeatedly denounced," etc.

Viewed in the light of the parties and issues before the court, this language was perfectly proper and pertinent. The plaintiff was a beneficiary by the terms of the policy as originally issued, named as a creditor, and the court very properly held that his *only interest* in the policy was *as creditor and to the extent of his debt only*. He was not a purchaser or assignee of the policy—in fact, there was no question of assignment of the policy in the case. Moreover, the insurance company itself was sued and had not waived anything.

The case falls very far short of settling the rights of the assignor and assignee of life insurance, as between them-

selves, where the insurer has waived all objections and paid the money—in fact, it does not touch that subject.

We have thus gone through with the reported decisions of this honorable court bearing on the question under discussion. It is apparent that this court has decided no case otherwise than it would have been decided by the application of either the "majority" or the "minority" rule, as we have stated them. In other words, no case has been before this court in which the principle we are contending for was material to its decision. No case has been before this court presenting the question of the assignability of a life insurance policy originally issued in good faith, to one who takes the same for a valuable consideration, with the knowledge and consent of the insurance company, and thus, in good faith, enables the policy holder to realize something of value on his policy, which would otherwise be forfeited for the non-payment of premiums.

And as indicating the general interpretation of the position of this court on this question, by judges, textwriters, and annotators, we make a short quotation from the able note of Judge Freeman to a case from 61 Neb., reported in 87 Am. St. Rep., p. 507. After analyzing the opinion of Judge Field in *Warnock vs. Davis*, and quoting with approval the observations of the court in *Ins. Company vs. Allen*, 138 Mass., 24; 52 Am. Rep., 24, to the effect that the noted remark of Judge Field in the *Warnock* case "was not necessary to the decision," Judge Freeman says:

"Such assignments are, of course, invalid, and the *real* position of this court is shown by its language in *Aetna Life Ins. Co. vs. France*, 94 U. S., 561: 'As held by us in the case of *Insurance Co. vs. Schaefer*, 94 U. S., 457, just decided, any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a mere wager policy.' Similar language is used in *New York Mut. Life Ins. Co. vs. Armstrong*, 117 U. S., 591.

A great many cases have made similar observations or criticisms upon the language of Mr. Justice Field in *War-nock vs. Davis*, and similar vindications of the *real* position of this court on this question, some of which we have heretofore cited.

As indicating what the "trend of opinion" has been in this court, we group together the *expressions* used which seem to sanction the "majority" rule and likewise those that have been construed as sanctioning the "minority" rule.

Those sanctioning the majority rule are as follows:

"It is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that *the party effecting the policy* had an insurable interest, * * * in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies."

Phoenix Mut. Life Ins. Co. vs. Bailey, 13 Wall., 616.

"Supposing a fair and proper insurable interest, of whatever kind to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained."

Insurance Co. vs. Schaefer, 94 U. S., 457.

"As held by us in *Insurance Co. vs. Schaefer*, any person has a right to procure insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy."

Insurance Co. vs. France, 94 U. S., 561.

"A policy of life insurance without restrictive words is assignable by the assured for a valuable consideration *equally with any other chose in action*, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies; and payment thereof may be enforced for the benefit of the assignee, and under the system

of procedure in many states, in his name. *Warnock vs. Davis*, 104 U. S., 775, 786." (Italics ours.)

Insurance Co. vs. Armstrong, 117 U. S., 597.

Those construed as sanctioning the "minority" rule are as follows:

"The assignment of a policy to one not having an insurable interest is as objectionable as the taking out of a policy in his name."

Warnock vs. Davis, 104 U. S., 775.

"It is the settled law of this court that the claimant *under a life insurance policy* must have an insurable interest in the life of the insured."

Crotty vs. Insurance Company, 144 U. S., 621.

Your honors will observe that the language last quoted is that a claimant *under a policy* must have an insurable interest, and not that a claimant *under an assignment* must have an insurable interest.

So, while, as above stated, no case has been presented to this court which involves the exact state of facts we have in this case, the language in the *Bailey*, *France*, *Schaefer*, and *Armstrong* cases, in 13 Wall., 94 and 117 U. S., clearly puts this court where it is classed by Mr. Bacon, Mr. May, Mr. Joyce, Mr. Vance, Judge Freeman, Judge Sanborn (in *Gordon vs. Ware National Bank*), and numerous other judges.

We also call attention to the following extracts from the texts of May on Insurance (ed. 1891), and of Vance on Insurance (1904).

Says Mr. May (sec. 398a):

"The doctrine that the assignment of a poplicy to one without interest in the life is as objectionable as the taking out of a policy without interest, does not seem good sense. If this is so, it is difficult to understand how the designation of a beneficiary outside of those having an insurable interest in the life can

be upheld. There seems to be a clear distinction between cases in which the policy is procured by the insured *bona fide*, of his own motion, and cases in which it is procured by another. It is a very different thing to allow a man to create voluntarily an interest in his termination, and to allow some one else to do so at their will. The true line is the activity and responsibility of the assured, and not the interest of the person entitled to the funds. It is well established that a man may take out a policy on his own life payable to any person he pleases, and it is drawing a distinction without a difference to hold that he cannot take out a policy and afterwards transfer its benefits."

And Mr. Vance, in his recent most excellent treatise on Insurance, at pages 140, 141, says:

"The validity of the assignment of a life policy to one having an insurable interest in the life insured, is unquestionable, but there is much conflict of authority and consequent confusion in the law as to whether a valid assignment of a life policy can be made to one having no insurable interest. This confusion is due partly to the difficult nature of the principles involved, and partly to the misleading opinion *Cammack vs. Lewis*, decided by the same court. of the United States, in the correctly decided case of *Warnock vs. Davis*, following the preceding case of *Cammack vs. Lewis*, decided by the same court. These confusing influences have further been aided and abetted by a catch phrase, which, however, does not state the issue fairly, to the effect that the law will not allow a person to procure by assignment insurance that he could not procure directly. A fair statement of the issue is found in the postulate that the law will allow the insured to designate a beneficiary under the policy as well by assignment as by original nomination.

"The true principle governing the question may be derived from the statement of some generally accepted rules of law:

"(1) A person insuring his own life may designate

any person whatever as beneficiary, irrespective of insurable interest in that beneficiary.

"(2) The law requires an insurable interest only at the inception of the policy, as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial.

"(3) Life insurance, though based on the theory of indemnity at its inception, is not a contract of indemnity, but chiefly of investment. As a chose in action, it has at any time after its issue a recognized value, termed the 'reserve value.'

"Hence we conclude that a policy of life insurance, validly issued to one having an insurable interest, becomes in his hands a valuable chose in action, which should be assignable as any other property right, unless such assignment be opposed to some clear rule of public policy; that this right remains unimpaired in the hands of the original assured, even after the termination of the interest upon which its procurement was based, and there can be no sufficient reason for requiring an interest in the assignee which is not possessed by the assignor; and, finally, that there is no sufficient reason why the beneficiary designated by assignment of the policy after its valid issue should be subject to a different rule as to interest required from that applying to the beneficiary designated at the time of the issue of the policy. Since an insurable interest is not necessary in the latter, neither should it be required of the former."

And the same learned author, after stating the facts in *Warnock vs. Davis*, comments on the opinion as follows (p. 142):

"It would be difficult to imagine a case showing more clearly than this a purpose to evade the rule of law forbidding wager policies, and to obtain indirectly insurance that the law would not allow directly. The real effect of the transaction was precisely the same as if the association had directly procured insurance upon the life of Crosser, in which they had absolutely no interest. The decision of the court, therefore, in refusing to uphold such a masquerad-

ing assignment, was eminently just and proper. But the court unfortunately went far beyond the case decided, and made various general observations, which apply equally well to cases entirely different from the one giving occasion to them, and have on that account been productive of much loose thinking and confusing adjudication."

General Weight of Authority.

Having shown that this honorable court is either already committed to the "majority" rule or else has never taken any definite position upon the single, sharp question presented in the case at bar, we will now inquire what is the general weight of authority upon the question.

It is admitted by adversary cocounsel and by the learned judge in the court below (Transcript, page 52), that the decided majority of the State courts uphold such assignments and a few cases are cited by the learned judge by way of illustration.

A recent examination discloses that only the States of Kansas, Alabama, Texas and Kentucky now stand clearly and unequivocally on the side of the "minority" rule. The State of Missouri is doubtful, the decisions seeming to point both ways, with possibly the stronger tendency to the "minority" rule.

On the other hand, England, Canada, Nova Scotia, New Brunswick, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin are unquestionably arrayed on the side of the "majority" rule. And if we correctly construe the decisions and expressions of this great court, the United States Supreme Court is also committed to that rule.

Four, and possibly five, States sustain the "minority" rule, and the United States Supreme Court, twenty-nine States, England, Canada, Nova Scotia, and New Brunswick support the "majority" rule. The cases cited below will amply bear out the statement:

New York Mutual Life Insurance Company vs. Armstrong, 117 U. S., 591.

Etna Life Insurance Company vs. Grant, 94 U. S., 561.

Etna Life Insurance Company vs. Schaefer, 94 U. S., 457.

Insurance Company vs. Bailey, 13 Wall., 616.

Murphy vs. Red, 64 Miss., 614; 60 Am. Rep., 68.

Steinback vs. Diepenbrock, 158 N. Y., 24; 70 Am. St. Rep., 424; 44 L. R. A., 417.

Olmstead vs. Keyes, 85 N. Y., 593.

Valton vs. Nat. L. Fund Assn., 40 N. Y., 21.

St. John vs. Am. Mut. Life Ins. Co., 13 N. Y., 31; 64 Am. Dec., 529.

Chamberlain vs. Butler, 61 Neb., 730; 54 L. R. A., 339.

Fitzpatrick vs. Hartford, &c., Ins. Co., 56 Conn., 116; 7 Am. St. Rep., 288.

Bursinger vs. Bank of Watertown, 67 Wisc., 76; 58 Am. Rep., 848.

Clark vs. Allen, 11 R. I., 439; 23 Am. Rep., 496.

Crosswell vs. Conn. Indemnity Assn., 51 S. C., 103; 28 S. E., 200.

Rylander vs. Allen, 125 Ga., 206; 6 L. R. A. (N. S.), 128.

A. O. U. W. vs. Brown, 112 Ga., 545; 37 S. E., 890.

Matloek vs. Bledsoe (Ark., 1905), 90 S. W., 849.

Mechanics Nat. Bank vs. Comins, 77 N. H., 12; 101 Am. St., 650.

Mut. L. Ins. Co. vs. Allen, 138 Mass., 564; 52 Am. Rep., 250.

- King vs. Crane*, 185 Mass., 103; 69 N. E., 1049.
Brown vs. Greenfield Life Assn., 172 Mass., 498;
 53 N. E., 129.
Dixon vs. Nat. Life Ins. Co., 168 Mass., 48; 46 N. E.,
 430.
Tateum vs. Ross, 150 Mass., 440; 23 N. E., 230.
Hurst vs. Robinson, 78 Md., 67; 44 Am. St. Rep.,
 266; 20 L. R. A., 761.
Rittler vs. Smith, 70 Md., 261; 2 L. R. A., 844.
Souder vs. Home Friendly Soc., 72 Md., 511; 20
 Atl., 137.
Hardy vs. Insurance Co., 152 N. C., 286; 67 S. E.,
 767.
Eckel vs. Renner, 41 Ohio St., 232.
Vivar vs. Knights Pythias, 52 N. J. Law, 455-469.
Trenton Mut. L. Ins. Co. vs. Johnson, 24 N. J.
 Law, 576-585.
Brown vs. Equitable Life, 75 Minn., 412; 79 N. W.,
 968, 1126.
Hogue vs. Minn. Packing Co., 59 Minn., 39; 60
 N. W., 812.
Martin vs. Stubbins, 126 Ill., 387; 9 Am. St. Rep.,
 620.
Bloomington M. B. Assn. vs. Blue, 120 Ill., 121.
Moore vs. Chicago Guar. Fund Life, 178 Ill., 202; 52
 N. E., 882.
Givens vs. Veeder, 9 N. Mex., 256; 50 Pac., 316.
Harrison's Admr. vs. Ins. Co., 78 Vt., 473; 63 Atl.,
 321; 112 Am. St. Rep., 932.
Lewis' Admr. vs. Edwards (Tenn.), Mss., Nashville,
 December Term, 1903.
Davis vs. Brown, 159 Ind., 644; 65 N. E., 908.
Millner vs. Bowman, 119 Ind., 440; 5 L. R. A., 95.
Amick vs. Butler, 111 Ind., 578; 60 Am. Rep., 722.
Hutson vs. Merrifield, 51 Ind., 24.
Wheeland vs. Atwood, 192 Pa. St., 237; 43 Atl. 946;
 73 Am. St. Rep., 803.

- Ulreich vs. Reinahl*, 143 Pa., 238; 22 Atl., 862.
Grant vs. Kline, 115 Pa. St., 618.
Fairchild vs. N. E. M. L. Ins. Co., 51 Vt., 613.
Hearings' Suc., 26 La. Am., 326.
Suc. of Miller vs. Manhattan Ins. Co., 110 La. Ann., 654.
Stewart vs. Sutcliffe, 46 La. Ann., 240; 14 So. Rep., 912.
Prud. Ins. Co., vs. Liersch, 122 Mich., 436; 81 N. W., 258.
Sheets vs. Sheets, 4 Colo., 450; 36 Pacc., 310.
Lemon vs. Phoenix Mut. L. Ins. Co., 38 Conn., 294.
Farmers & Traders Bank vs. Johnson, 118 Iowa, 282; 91 N. W., 1074.
Curtis vs. Aetna L. Ins. Co., 90 Cal., 255.
McFarland, Adm'r, vs. Creath, 35 Mo. App., 112-121.
Ins. Co. vs. Hamilton, 5 Sneed (Tenn.), 269.
Ashley vs. Ashley, 3 Sim., 149; 6 Eng. Chy. Rep., 149.
Dalby vs. India & London Policy Co., 15 C. B., 365. and note.
Law vs. London Policy Co., 1 Kay & J., 223.
Vazina vs. N. Y. L. Ins. Co., 6 Can. S. C., 278.
N. Am. L. Assur. Co. vs. Craigen, 13 Can. S. C., 278; 18 Nova Scotia, 440.
Mut. L. Assur. Co. vs. Anderson, 1 N. Bruns. Eq. Rep., 466.
Brett vs. Warnick, 44 Or., 511; 102 Am. St. Rep., 639; 75 Pac., 1061.
Cunningham vs. Smith, 70 Pa., 450.

In Virginia the question has been regulated by statute, namely, chapter 180 of the special session of 1903, approved April 27, 1903, the act being as follows:

Act to Regulate the Assignability of Life Insurance Policies in Virginia, Approved April 27, 1903.

Acts of Virginia, Special Session, 1902-3-4, Page 256, Chapter 180.

"1. *Be it enacted by the General Assembly of Virginia*, That a policy of insurance on life, taken out by the insured himself, or by a person having an insurable interest in his life, in good faith, and not for the mere purpose of assignment, may be lawfully assigned to any one, for a valuable consideration, as any other chose in action, without regard to whether the assignee has an insurable interest in the life insured or not, and the assignee may recover upon it whatever the insured may have recovered but for such assignment."

"2. This act shall be in force from its passage."

We will quote briefly from a few of the above cases, which show better than we are able to do, the strong reasons supporting the "majority" rule.

In *Ritter vs. Smith* (Md.), 2 L. R. A., the Supreme Court of Maryland, in discussing the same subject, said (page 846):

"In some cases they (assignments to persons without insurable interest) have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be, doubted. It means that one not a relative, or connected by consanguinity, or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty of such a crime.

"This doctrine carried to its logical result has a far-reaching effect. It strikes down every legacy to a stranger which may become known to the legatee, as is frequently the case, before the death of the testator. It makes void every similar limitation in

remainder after the death of a life tenant. Every conveyance of property in consideration that the grantee shall support the grantor during his life falls under the same condemnation. Yet we know of no case in which a court has declared such testamentary dispositions or conveyances to be void on this ground. Other instances in which the same result would follow from the application of this doctrine could be readily suggested, but we need not pursue the subject further."

The point is made in some of the decisions following the "minority" rule, and was made by his honor Judge Lurton, in the case at bar, that the fact that the assignee of a policy assumes, or is required to pay, the future accruing premiums in order to keep the policy alive, is an additional inducement to the assignee to desire the death of the insured, and is to be regarded as an important factor in holding such assignments of life insurance invalid. This contention is well answered by the Supreme Court of Georgia in *A. O. U. W. vs. Brown*, 112 Ga., 545; 37 S. E., 890, where the court, in commenting upon the case of *Union Fraternal League vs. Walton*, 109 Ga., 1, said:

"It is true that in that case the assessments were kept up by the assured, while in the case in hand the assessments becoming due after the benefit fund was made payable to Mrs. Brown were to be paid by her, the beneficiary. We are unable to see, however, why that difference should alter the principle underlying the conclusion reached by the majority of the court in *Union Fraternal League vs. Walton*. The public policy which prevents one person from insuring the life of another in whose life he has no insurable interest, is based upon the presumption that a temptation would be held out to the one taking out the policy to hasten, by improper means, the time when he should receive the amount named in the policy. Such temptation would be as strong, we think, in a case where the assured took out a policy upon his own life for the benefit of one having no interest

therein, and was to keep up the premiums or assessments, as it would be where the premiums or assessments were to be paid by the beneficiary. Indeed, the temptation to hasten the death of the assured might be stronger where the assessments were to be paid by him than where they were to be paid by the beneficiary, for the reason that the beneficiary could not be certain that the assured would continue to pay the assessments."

In *Murphy vs. Red*, 64 Miss., 614; 60 Am. Rep., 68, the Supreme Court of Mississippi, in upholding assignments of the kind under discussion, after citing certain cases holding the contrary doctrine, uses the following vigorous language:

"The weight of reason and authority, we think, is against this view. There is obvious difference between the two transactions. It is contrary to public policy for a person to insure the life in which he has no insurable interest, and to derive benefit or advantage therefrom. This is condemned as gaming or wagering on the chances of human life, and as such is prohibited by law. But it is lawful for one person to insure his own life and after he has done so the policy becomes his own, if payable as in this case, and there is no good reason why he may not sell or dispose of it as he may of any other chose in action, if the policy was valid in its inception.

"A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business, or absolute necessity, may require him to do so. He may have paid large sums in premiums, and afterwards become unable to pay any more, and if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed and lost. To impair the value and utility of his policy, or require him to lose it, on the ground that if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one who had no insurable interest in his life would

be tainted with the vice of gambling is, as matter of law, extremely fanciful and unsatisfactory.

"Other interests and conditions, generally prevalent, and involving tendencies quite as fatal to human life, may be created and are maintained without any such restriction. It seems that a life tenant would be in about as much danger from the remainderman, and a testator from a person having no interest in his life, for whom he had made provision by will, as the insured would be from the assignee or purchaser without interest of his life insurance policy. An insurable interest in the assured, at the time the policy is issued, is essential to the validity of the policy, but it has often been decided, as where a creditor takes out a policy on the life of his debtor, that it is not necessary to the continuance of the insurance that the interest in the life insured should continue. Cessation of interest by payment of the debt in the case supposed, would not terminate the policy. (Citing cases.)

"If the danger to life is not adequate to avoid the policy in such cases when the interest in the life ceases, it is not perceived why it should be deemed sufficient to invalidate a contract by which a policy is sold and assigned to one without interest. Besides, the protection should not be overlooked which is afforded to the life insured by the doctrine that one cannot recover insurance money payable on the death of a party whose life he has taken by felonious act. It would be a reproach to the law of the land if he were allowed to do so. He could not, in fact, do so, any more than he could recover insurance money on a building which he had wilfully set fire to and burned."

We likewise quote from Bliss on Life Insurance, section 30, cited by Mr. Justice Bradley, in the Schaefer case:

"Though there were some early decisions to the contrary, founded chiefly upon the overruled case of *Godsall vs. Boldero*, it is now settled that if there is any insurable interest so as to make the policy valid at the time of its issue, it will, in the absence

of a stipulation to the contrary, remain valid no matter what may subsequently occur to change the amount of interest or even to terminate it entirely. *If obtained by one having at the time an insurable interest, it may be assigned to one who has not and never had any interest in the life insured."*

Minority Rule Due to Misunderstanding of the Reason of the Law Against Wager Policies.

We respectfully submit that the cases upholding the "minority" rule are due, first, to a misunderstanding of the reasons underlying the rule which condemns the *taking out* of policies on lives in which there is no insurable interest, either directly or under cover of an assignment; and, second, to an improper application of those reasons as understood by them, to assignments such as that involved in the case at bar.

With all deference to the learned judge who decided this case in the Circuit Court of Appeals, we respectfully submit that he is mistaken when he says that the only reason for condemning the taking out of policies by those without an insurable interest or the assignment, by previous arrangement, would be found in the fact that such a beneficiary or fraudulent assignee would have no interest in the continuance of the life of the insured, but an interest in his speedy death. We respectfully submit that the only reason for condemning *assignments* made by virtue of an agreement contemporaneous with or ante-dating the policy assigned, is that it is an evasion of the law against persons *procuring* life insurance on lives in which they have no interest—"a cover for a *wager policy*."

But assuming the reason for condemning *such policies or assignments* to be to discourage murder, must it necessarily follow that assignments in good faith must be likewise condemned for the same reason? There is a vast difference in the *creation* of an interest in another's death by one without

interest, in such amounts as he can persuade the companies to issue, and in purchasing an interest *already created*, the amount and nature of which was fixed by the insured himself.

The only reason assigned for extending the rule condemning "wagering policies" and "covers for wager policies" to assignments of *valid policies*, made in good faith, is that in either case the death of the insured would be a pecuniary advantage to the assignee or the beneficiary, as the case might be. Is this sufficient reason? Must every transaction be condemned of which the same thing is true? If so, the court must strike down:

1. All reversionary interests, particularly if the reversioner leases the life estate for a stipulated yearly rental.
2. All expectancies of every kind, except where there is an insurable interest in the life of the tenant in possession.
3. All purchases of estates in consideration of life support of the vendor by the vendee.
4. All contracts to pay annuities.
5. All legacies or devises to persons without interest in testator's life.
6. All policies in which beneficiaries without interest have been named in the policy itself, as in the cases of—

Foster vs. Insurance Company, 125 Fed. Rep., 537.

Insurance Company vs. Barr, 68 Fed. Rep., 873.

Life Association vs. Jeffords, 175 Fed. Rep., 402.

Kentucky Life & Casualty Company vs. Hamilton, 63 Fed. Rep., 93.

Langdon vs. Union Mutual Life Insurance Company, 14 Fed. Rep., 273.

Insurance Company vs. France, 94 U. S., 561.

7. All policies where interest has ceased, as in the cases of—

Insurance Company vs. Schaefer, 94 U. S., 457, and

Sykes vs. Insurance Company, 16 Fed. Rep., 671.

8. All assignments where assignee's interest has ceased before the maturity of the policy, as in—

Manhattan Life vs. Hennessy, 99 Fed. Rep., 651.

9. All purchasers of policies at judicial sales, by persons without interest, as in—

Gordon vs. Ware National Bank, 132 Fed. Rep., 444.

10. All policies where beneficiaries without interest are designated subsequent to the issuance of the policy by some means other than assignment, as in—

Robinson vs. United States Mutual Accident Association, 68 Fed. Rep., 825.

Ingersoll vs. Knights, 47 Fed. Rep., 272.

Lamont vs. Grand Lodge, 31 Fed. Rep., 177.

Lamont vs. Hotel Men's Association, 30 Fed. Rep., 817.

And doubtless many others, well recognized as valid under the law. The rule should even be applied less rigorously in cases like the one at bar, because the murder of the insured by the beneficiary or the assignee would under all our cases, *ipso facto*, destroy their right to collect the proceeds of the policy.

It is certainly good public policy to enforce contracts according to the intent and purpose of the contract itself. Therefore, there should be clear and positive reasons for annulling them. It should appear that to permit such assignment *actually does* increase the number of murders. We do not believe that experience will bear this out. Contracts entered into in good faith should certainly not be condemned on any shadowy or fanciful grounds.

**The Reason for the Law Against "Wager Policies"
Not Applicable to Assignments of Valid Policies.**

The law against a person originally procuring life insurance on a life in which he has no interest, originated in the famous act of 14 George III, chapter 48.

At common law policies originally procured by persons without interest in the lives insured were valid.

Bunyon on Law of Life Insurance, page 8.

British Insurance Company vs. McGhee, 1 Cook, and Alcott (Irish), 182.

Also, what were known as "wagering policies", which were policies contingent upon an event which might or might not happen, as if A should die before B, or if A should die within ten years (so that in one event the entire premium would be lost, and in the other the entire policy would be won), were valid.

Bunyon on Law of Life Insurance, section 4, pp. 5 and 6.

Cousins vs. Nantes, 3 Taunt., 513.

While at common law wagers were void that were enticements to breaches of the peace or immorality, or generally, for some reason inherent in the particular case, contrary to sound public policy, there was nothing in a wager dependent upon the death of a human being which rendered it obnoxious to the rule against illegal wagers. The fear of the law was considered quite sufficient to countervail the temptations to assassination.

Bunyon on Law of Life Insurance, 2d edition, pp. 7 and 8.

Gilbert vs. Sykes, 16 East., 155.

Earl of Chesterfield vs. Jansen, 1 Hek., 346; 2d Ves., 125.

Marsh vs. Pigot, 3 Burr, 2802.

The act of George III, chapter 48 (1774), prohibited any insurance *being made* on the life of any person or on *any other event* where the person for whose use such policy was made should have no interest, the reason assigned in the preamble being that the *making* assurances on lives or *other events* wherein the insured had no interest had induced a "*mischievous kind of gaming*."

The "mischievous kind of gaming" which the act was passed to remedy is quite vividly described as it was practiced in 1774 in Francis' Annals of Life Insurance, page 140. He says:

"Policies were obtained on the lives of public men with a recklessness at once disgraceful and injurious to the morals of the country. That of Sir Robert Walpole was assured for many thousands; and at particular periods of his career, when his person seemed endangered by popular tumults, as at the Excise Bill or by party hate, as at the time of his threatened impeachment, the premium was proportionately enlarged.

"When George II fought at Dettingen, twenty-five per cent. was paid against his return. The rebellion of 1745, as soon as the terror which it excited had passed away, was productive of an infamous amount of business. The members of Garraway's, the assurers at Lloyd's, the merchants of the Royal Exchange, being unable to raise or lower the price of stocks any more by reports of the Pretender's movements, made sporting assurances on his adventures, and opened policies on his life. Sometimes the news arrived that he was taken prisoner, and the underwriters waxed grave. Sometimes it was rumored that he had escaped, and they grew gay again. Thousands were ventured on his whereabouts and tens of thousands on his head. The rebel Lords who were captured in that disastrous expedition, were another source of profit to the speculators. The grey hairs of old Lord Lovat did not prevent them from gambling on his life. The gallantry of Balmerino, and the devotion of Lady Nithsdale, raised no soft scruples in the minds of the brokers; and when the

husband of the latter escaped from the Tower, the agitation of those who had perilled their money on his life, and to whom his violent death would have been a profit, is described as noisy and excessive. No sooner was it known that he had escaped, than fresh policies were opened on his recapture; and great must have been the indignation of his high minded wife, when she afterwards heard of this trait of city character. * * *

"Successes and disasters were all the same to the assurers. The seals of a Prime Minister, or the life of a highwayman answered equally the purpose of the policy-mongers; and India or Minorca, Warren Hastings or Admiral Byng were alike to them if they could put money in their purses. There was absolutely nothing on which a policy could be opened that was not employed as the opportunity of gambling."

This condition of affairs, then, and not the encouragement to murder lent by permitting such insurance to be made, gives rise to the act prohibiting it. It is easily seen that the evils described grow out of *the making of assurances*, directly or by subterfuge, and are in no way incident to *assignments* after the policy has been issued in good faith.

The courts of England have, therefore, held such assignments valid, and not affected by this act. As said by Bunyon, B., in his work heretofore referred to, 1868 Ed., page 24:

"It is not necessary that the insurable interest and the beneficial ownership of the policy should remain in the same person, *but an assignee, possessing no such interest, will be entitled, as the purchaser of the policy, to bring an action upon it in the name of the assured and will be protected by the insurable interest of his vendor.*"

The question was decided squarely in *Ashley vs. Ashley*, 3 Sim., 149; 57 Eng. Reprint, 956. In that case insured sold a one thousand pound policy on his life for five shillings and certain other considerations. Several successive

sales of it were made before the policy finally matured and suit was brought *by an assignee without interest*. The question being presented to the court on exceptions to the report of a master declaring assignee's title to the policy good, the vice chancellor, *inter alia*, says:

"Unless this transaction is affected by the Act of Parliament, no objection can be made to it. By the 14 George III, ch. 48, it is enacted:" * * * (he here sets out the Act): "Now there is not a word said here as to the *assignment* of policies. This policy was good at the time it was effected."

After setting out the circumstances of the transaction and discussing the procedure in such cases, he says of the assignment:

"It appears to me that a purchaser for a valuable consideration is entitled to stand in the place of the original assignor, so as to bring an action in his name for the sum insured."

This case was followed in *Dalby vs. Assurance Company*, 15 C. B., 365, which has been heretofore reviewed, and other English cases.

In this country, acts based upon 14 George III, chapter 48, have been passed by the State legislatures, the English statutes have been considered operative, or the older common law has been followed.

Connecticut Mutual Insurance Company vs. Schaefer, 94 U. S., 457.

In each of these instances the courts must arrive at the same result, namely, to hold in accordance with the "majority" rule, that, as said by Judge Fields in *Mutual Life Insurance Company vs. Armstrong*, 117 U. S., 597—

"A policy of life insurance * * * is assignable by the assured for a valuable consideration, *equally with any other chose in action*, where the assignment is not made to cover a mere speculative risk, and thus

evade the law against wager *policies*, and payment thereof may be enforced for the benefit of the assignee; and, under the system of procedure in many States, in his name."

There is no Provision in the Life Insurance Policy Itself Which Militates Against the Right of the Petitioner, as Assignee, to Collect the Amount of the Policy.

The only provision in the policy which the Circuit Court of Appeals, in the case at bar, mentioned as at all bearing on the question of the validity of the assignment, and which appears among the "Guaranteed Privileges, Benefits and Conditions" endorsed on the policy, is the following:

"Any claim *against the company*, arising under any assignment of this policy, shall be subject to proof of interest" (Tr., pp. 32, 33; Opinion, Tr., pp. 66, 67).

We do not understand the opinion of the Circuit Court of Appeals in the case at bar as being to any extent *grounded* upon the above quoted clause of the policy. This is true because, in the opinion, after expressing the view that this clause was not placed in the policy solely for the protection of the company, the learned Court of Appeals said:

"But, if there is no question of public policy involved in respect of the assignability of such contracts, the clause, in the circumstances of this case, is of *little consequence* (Tr., p. 67).

The learned Court of Appeals does, however, seem to attach some importance to this provision, and to give it some weight in its consideration of the main question, and for that reason we notice it here.

It is clear from the authorities that this provision of the policy was intended solely for the benefit of the company,

and cannot be strained into a contract restriction against the assignment of the policy. By its very terms it is merely a right reserved to the company to require proof of interest when liability is asserted *against it by an assignee*; and, according to practically all the authorities, being for the sole benefit of the company, it could be waived by it and became nugatory, when the company recognized the assignment, received premiums from the assignee, and paid the amount of the policy into the court below, under its bill of interpleader, with an expressed indifference upon its part as to who should receive the fund.

It will appear by reference to the policy that it was payable to the "executors, administrators, or assigns" of the insured (Trans., p. 31). A duplicate of the assignment was, immediately upon its execution, sent to the company, as appears by the stipulation (Trans., p. 29), and, as has been seen, the original bill of the company admitted notice of the assignment and its assent to it.

It will also be observed that all of the ten provisions endorsed on the policy under the heading, "Guaranteed privileges, benefits, and conditions," and from the sixth of which the above contract is quoted, referred to the reciprocal relations between the company and the insured and were obviously for the *protection of the company*. They did not undertake to prescribe limitations upon the dealings between the insured and third parties—except to declare the conditions upon which an assignee of the *policy would be recognized, as such, by the company*.

We submit that it is very clear that the provision under discussion was merely a condition imposed by the company *for its own protection*, and might be and was waived by it. It is even so held where the policy declares that it **SHALL BE VOID** unless such and such things be done—cases much stronger than this.

In Bliss on Life Insurance, 445, it is said:

"Provisions declaring policies void in certain contingencies are inserted for the benefit of the insurers, and though the language in such cases usually is that the policy 'shall be void,' not 'shall be voidable,' yet it is a provision inserted *for the benefit of the company*, and may be waived by it."

In 2 Cooley's Briefs on the Law of Insurance, page 1082:

"A provision in a policy that, in case of assignment, notice shall be given the company, has been held to amount to a contract that the policy may be assigned by giving such notice. And even though it is provided that the policy *shall not be assigned*, it is a provision that *the company only can take advantage of*, and if the company consents, the assignment will be valid as against third persons."

And in volume 1, page 277:

"Provisions of the policy forbidding an assignment to one not having an insurable interest may be waived by the company, being inserted for its benefit."

The same rule obtains as to fire insurance policies (*Id.*, vol. 2, p. 1859).

May on Insurance is to same effect (sec. 384).

Speaking of such clauses Joyce on Insurance, volume 3, section 2325, says:

"A clause of this nature rendering the policy void in case certain conditions as to the manner of making the assignment are not complied with is for the benefit of the insurers. They may insist upon a forfeiture or not as they may desire, and though the conditions as to assignment may be clearly violated, still if the insurers desire, they may elect to waive the violations of such conditions and treat the policy as a valid subsisting contract of insurance."

And so in 1 Bacon Ben. Soc. & Life Ins., section 298:

"This assent is a matter between the company and the person asserting the claim under the policy, and

consequently an assignment may be good between the parties, although the assent of the company is required by the terms of the contract and has not been obtained."

And again, in section 310b:

"When the association pays the money into court" (in interpleader cases) "it waives the right to question the validity of the assignment. It follows that the court, having possession of the fund, will dispose of it in accordance with the principles of equity and the limitations imposed by the statutes of the forum."

And in section 298:

"If the assignment is good under the law of the place where made, it is good everywhere, and the consent once given cannot be withdrawn unless given under a mistake or because of misrepresentation."

Numerous cases are cited in support of these texts.

Now by the very terms of the provision of the policy in question it applies only when a liability is sought to be established *against the company*. That provision, as has been seen, is "That any claim *against the company* arising under any assignment of this policy shall be subject to proof of interest." By its very terms, the company having waived the provision, paid the insurance money and retired from the case, the provision is no longer in force; and this is the effect uniformly given to such provisions, even though their language be much stronger.

In *Spencer vs. Meyers*, 150 N. Y., 269; 34 L. R. A., 175, the contest was between the assignor and assignee over the proceeds of an insurance policy. The assignor was the wife of the insured, and the original beneficiary in the policy. The assignor and assignee were impleaded by the insurance company, which paid the money into court. The policy

contained a provision "that no assignment of this policy shall be valid."

The court said:

"The stipulations in the policy against an assignment do not affect the question as to the defendant's (the assignee's) rights. Whatever force these clauses had, the company alone can take advantage of them, and as it has declined to, and paid the money into court, they do not concern the plaintiff."

In *Mechanics Nat. Bank vs. Comins*, 72 N. H., 12; 101 Am. St. Rep., 650, the policy contained a provision exactly like the one in the present case, and the assignment was to one without insurable interest. The contest was between the assignor or his representative, and the assignee, the insurance company having paid the money into court. This provision of the policy was relied on to defeat the assignment. The court, on this point, said:

"The provisions in the policy regarding assignment, upon which the defendant relies, were inserted for the protection of the company. The company has waived them by admitting liability and paying the money into court. They are not available to the defendant."

The court cites:

Knights of Honor vs. Watson, 64 N. H., 517;
and
Brown vs. Mansur, 64 N. H., 39.

The following cases are to the same effect, and we cite them without further comment:

Foster vs. Preferred Acc. Ins. Co., 125 Fed. Rep., 536-542.

Clark vs. Eq. Ins. Co., 143 Fed. Rep., 175.

Hurst vs. Robinson (Md.), 44 Am. St. Rep., 266;
20 L. R. A., 761.

Hogue vs. Min. Pkg. Co., 59 Minn., 39.

- Myers vs. Schuman*, 54 N. J. Eq., 414; 34 Atl., 1066.
Johnson vs. Van Epps, 110 Ill., 551.
Graff vs. Mut. L. Ins. Co., 92 Ill. App., 207.
Oil City vs. Gdn. Mut. L. Ins. Co., 5 Big Ins. Cases, 478.
Jarvis vs. Binkley, 206 Ill., 541.
Lee vs. Murrell, 9 Ky. Law Rep., 104.
Conn. Mut. L. Ins. Co. vs. Tucker (R. I.), 61 Atl., 142.
Powell vs. Dewey (N. Ct.), 68 Am. St. Rep., 818.
Moore vs. Ins. Co. (Ill.), 52 N. E., 882.
Buckbee vs. U. S. Ins. Co., 18 Barb. (N. Y.), 541.
Viele vs. Germania Ins. Co., 26 Iowa, 9.
Burgess vs. N. Y. Life Ins. Co. (Tex.), 53 S. W., 602.
Ramsey vs. Meyers, Pa. Dist., 468.

So we submit that if the decision of the Court of Appeals in the case at bar, holding the assignment void, is in any respect grounded upon the above quoted provision of the policy, it is manifestly erroneous.

It is not to be overlooked that the provision in question does not require that an assignee, even in asserting his claim *against the company*, shall show an *insurable interest in the life insured*. It is simply that any such claim, that is "*claim against the company arising under any assignment of this policy*," shall be "*subject to proof of interest*." Interest in what? It does not say "*in the life insured*." The policy, on its face and by its very terms, is made payable to the "*assigns*" of the insured, if there be such; the sixth clause of the "*Guaranteed Privileges, Benefits and Conditions*" from which the provision in question is quoted, provides for notice to the company of assignments of the policy; and the policy nowhere provides that it shall be assigned only to persons with insurable interest in the life insured. If the claim of

the assignee against the company be made as pledgee of the policy as security for debt, the company may obviously, under this clause, require him to establish his debt; if made as *owner*, under absolute purchase of the policy for value, does not the claimant establish his *interest*, in the sense of this clause, by showing that fact? We submit that he does. But at all events, as already shown, the requirement, whatever its scope, is alone for the benefit of the company which has waived it.

III.

The Circuit Court of Appeals erred in holding that the contract of assignment of this life insurance policy, admittedly made in good faith, was void upon any supposed ground of "public policy," when the previous holdings of the highest court in the State of Tennessee, where the assignment was made and performed, where the parties were domiciled, and where the litigation arose, are to the contrary.

It will not be questioned that by the decisions of the Supreme Court of Tennessee, the assignment in question is good.

- Lewis vs. Edwards* (M. S. Opin., 1903).
- Rison vs. Wilkerson*, 3 Sneed, 565.
- Mut. etc., Ins. Co. vs. Hamilton*, 5 Sneed, 269.
- Tenn. Lodge vs. Ladd*, 5 Lea, 716.
- Williams vs. Carson*, 9 Baxter, 516.
- Clement vs. Ins. Co.*, 17 Pick., 22.
- Scobey vs. Waters*, 10 Lea, 551.
- Gosling vs. Caldwell*, 1 Lea, 454.
- Handwerker vs. Diermeyer*, 12 Pick., 619.
- Wright vs. Wright*, 16 Pick., 313.

It is respectfully submitted that the question stated in above heading is one which deserves the most careful attention and scrutiny of this honorable court.

It was disposed of quite summarily by the learned Circuit Court of Appeals, on the ground that the question is not of the class in respect to which, under the rulings of this honorable court, the Federal courts are bound to follow *State decisions*.

Whether this honorable court has hitherto had presented to it this precise phase of the subject of Federal and State comity or not, we shall not now undertake to say—at least we shall not go exhaustively into that question, as it would make this brief too long. We believe it has not, in any decided case, had presented to it, or considered, the arguments and reasons cogently suggested by the facts of this case for following State decisions declaring State policy and vested contract rights in cases of the precise nature of the case at bar.

This case involves no Federal question—no right of the litigants which is touched or affected by the Federal Constitution, treaties, or acts of Congress. It happened to get into the Federal court simply by reason of the fact that the insurance company which issued the policy, but was in no wise interested in the controversy, was a citizen of another State and chose to file its bill of interpleader in the Federal court. The parties to the controversy from the beginning, and who only are now before the court, are all citizens of Tennessee, contending over the validity of a contract made in Tennessee, fully performed by them in Tennessee, creating vested and valuable rights sanctioned and upheld by the laws and public policy of Tennessee, and the case is instituted in a tribunal sitting in Tennessee. Under these circumstances, it is respectfully submitted that whether the Federal courts have hitherto held themselves *bound* to fol-

low State decisions on more or less similar questions or not, every reason exists why they should do so in cases of exactly this nature, and that to fail to do so will lead to results most anomalous and confusing.

It was conceded by adversary counsel in the Court of Appeals—we quote from their brief—"That the contract of assignment is a separate and distinct contract from the contract which is so assigned which merely forms the *subject* of the contract of assignment," and the authorities are uniform to that effect—we need not cite them, for they are all one way.

It is also practically a universal law of contracts that they are valid or invalid according to the law of the place where made, and this rule has been many times applied to assignments of insurance policies.

Von Hoffman vs. City of Quincy, 4 Wall., 550.

Ogden vs. Saunders, 12 Wheat., 259.

Fletcher vs. Peck, 6 Cranch, 87.

White vs. Hart, 13 Wall., 646.

Osborn vs. Nicholson, Id., 654.

Walker vs. Whitehead, 16 Wall., 317.

Edwards vs. Kearzey, 96 U. S., 607.

Pritchard vs. Norton, 106 U. S., 129.

Buchanan vs. Bank (C. C. A.), 55 Fed., 223.

Lehman vs. Feld, 37 Fed., 852.

Ward vs. Vosburgh, 31 Fed., 12.

Swann vs. Swann, 21 Fed., 299.

Liverpool Steam Co. vs. Ins. Co., 129 U. S., 397.

Cogland vs. R. R. Co., 142 U. S., 101.

Pinney vs. Nelson, 183 U. S., 148.

Speed vs. May, 17 Pa. St., 91.

Spencer vs. Meyers, 150 N. Y., 269.

Union Cent. L. Ins. Co. vs. Woods, 11 Ind. App., 335.

Dundas vs. Bowler, Fed. Cas. No. 4141.

Newcomb vs. Mut. L. Ins. Co., Id., No. 10479.

Memphis Sav. Bank vs. Houchins, 115 Fed., 96

- Watson vs. Bonfils*, 116 Fed., 157.
Suc. Miller vs. Manhattan Ins. Co., 110 La. Ann., 654.
Lally vs. Holland, 1 Swan (Tenn.), 399.
Allen vs. Bain, 2 Head (Tenn.), 107.
Miller vs. Campbell, 140 N. Y., 457.
Crouse vs. Ins. Co., 56 Conn., 176.
Mut. L. Ins. Co. vs. Allen, 138 Mass., 24.
Mut. Ben. L. Ins. Co. vs. Bank, 68 Mich., 116.
Pomeroy vs. Ins. Co., 40 Ill., 398.
Story on the Const., sec. 1380.
Cooley's Const. Lim. (7th ed.), pp. 404-5.
2 Lewis' Suth. Stat. Const. (2d ed.), secs. 660, 631.
9 Cyc., pp. 672, 673.
Whart. Confl. Laws, secs. 487, 490.
Greenhood Pub. Pol., p. 46.
22 A. & E. Enc. Law (2d ed.), 1329-1331 and 1343.
19 Id., p. 90.
Bacon Ben. Soc. & Life Ins., secs. 297-8.
1 Joyce on Ins. (last ed.), sec. 232.
2 Cooley's Ins. Briefs, p. 1097.

The case of *Succession of Miller vs. Manhattan Ins. Co.*, 110 La. Ann., 654, well states the principle supported by the above citations and is especially clear and full, both on the point that an assignment of a policy of insurance is a *separate and distinct contract* from that of the policy, and on the point that the assignment is governed by the *law of the place where it is made*. In that case, as in this, it was stipulated between the insured and insurer when the policy was issued that it was to be a New York contract. The assignment was made by the insured to his wife in Louisiana, where they both lived, and its validity was in dispute. The court said:

"The assignment was made long after the insurance contract. It was a contract between Miller and

his wife, entered into at the place of their domicile, in Louisiana. The insurance contract between Miller and the insurance company and this assignment between Miller and his wife are not a single contract, but two distinct, separate contracts. Granting that the insurance contract itself is a New York contract, governed by the laws of the State of New York, as in fact it is, since the parties so agreed, the consequence does not follow that the assignment also is. The insurance contract was intended to govern the relations between the company and the holders of the policy, but not the relations between the assignor and assignee of the policy. It did not undertake to prescribe to whom Miller should make the assignment, nor by what form of contract he should make it—whether by sale or donation—nor to regulate his capacity and that of his assignee to enter into contractual relations with each other; and these are the very questions in controversy here. We think the contract between Miller and his wife must be held to be governed by the laws of Louisiana, the place of their domicile and of the contract. 'The validity of the assignment' of a policy of life insurance 'is to be determined by the law of the place where the assignment was made, and not by the law of the place where the policy was issued or the insurance payable.' (19 Am. & Eng. Enc. Law, 2d ed., p. 90.) Incorporeal rights follow the person of the owner, and the validity and effect of their transfer is governed by the law of the place where the transfer takes place."

It is the unquestioned theory of our judicial system that the laws in force *at the time and place* of a contract inhere in and become part of it, so far as they are applicable to it. Said Chief Justice Taney, in *Bronson vs. Kinzie*, 1 How., 319, speaking of a mortgage contract made in Illinois prior to the passage of a statute giving a twelve months' right of redemption after sale:

"When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None

such, at least, has been brought to the notice of the court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract and formed part of it, without any express stipulation to that effect in the deed. * * * So also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed part of it."

As more tersely said by the court in *Von Hoffman vs. City of Quincy*, 4 Wall., 550:

"It is also settled that the laws which subsist *at the time and place of the making of a contract*, and where it is to be performed, *enter into and form part of it*, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

But what is meant by the *law of the place of the contract*, which thus enters into and forms part of the contract?

In this country, where the *place of contract* is within a State, as in Tennessee, and not within the exclusive jurisdiction of the National Government, and the contract does not involve any subject covered by the paramount laws of the nation—and by these we mean the Federal Constitution, treaties, and lawful acts of Congress—it is necessarily the municipal law of that State, whether customary or statutory, that is meant; all the cases and discussions on the subject proceed upon this idea. Said Mr. Justice Washington in the great case of *Ogden vs. Saunders*, 12 Wheat., 257, 259:

"The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge.

"But the question, *which law is referred to* in the above definition, still remains to be solved. It can-

not, for a moment, be conceded that the *moral law* is intended, since the obligation which that imposes is altogether of the imperfect kind which the parties to it are free to obey or not, as they please."

The learned judge then takes up and discusses the "universal law," or general law of all civilized nations, and shows unanswerably that that cannot be meant, and concludes:

"It is, then, *the municipal law of the State, whether that be written or unwritten*, which is emphatically the law of the contract made within the State, and must govern it throughout, *wherever its performance is sought to be enforced.*"

It would be impossible to find, in all the books upon the law, a more terse, direct and felicitous statement of the general principle which governs the question under discussion than the above language of Mr. Justice Washington; and while the case of *Ogden vs. Saunders*, owing to the multiplicity of opinions delivered in it, has been the subject of much comment and some criticism, of its result, and the above language itself attempted to be qualified by some of the minority opinions, still that language stands as the settled law of this country on three kindred propositions, namely:

1. That when it is said the law of the place of a contract governs it is the *law of the State where* the contract is made that is meant.

2. That the *law of the State* so referred to is either the written or unwritten law of such State, that is, its statute or common law; and,

3. That the law of the State where a contract is made, in force at the time, inheres in the contract, as part of it and of its obligation, and is enforceable in whatever court the controversy may arise.

In *Pritchard vs. Norton*, *supra*, which involved the validity of an indemnity bond made in New York for the protec-

tion of a surety on an appeal bond in a court of Louisiana, Mr. Justice Matthews, speaking for this court, said:

"The court below, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights *precisely as should a tribunal of the State of Louisiana according to her laws*; so that, in that sense, there is no question as to what law must be administered. But, in case of contract, the foreign law may, by act and will of the parties, have become part of their agreement; and, in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory. * * *

"The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the *substance* of the obligation and affects the *rights of the parties*, as growing out of the contract itself, or inhering in it, is *governed by the law of the contract*."

The decisions of the Federal courts on the question whether they will or will not follow State decisions in given cases, have not, we respectfully submit, been always clear and uniform; and we have found it impossible to deduce from them any general rule by which all decided cases may be reconciled and future cases governed. Aside from express statutes, about which there seems to be no question, it may be said that the Federal courts will, generally speaking, construe and apply the *common law* and the *general commercial law*—really a branch of the common law—for themselves; but where this has been done, it has generally been in matters of *tort*, matters of *diligence* or *negligence*, *measure of damages*, and the *construction* and *meaning* of *instruments* and *documents*.

Whether a contract between two citizens of a State, about a subject-matter not within the regulation of Congress, be

valid on the one hand, or void as in violation of law or public policy on the other, is a question peculiarly for the courts of that State in the absence of a controlling statute. The different States formulate and maintain, through their *courts* no less than through their Legislatures, different and opposite policies on many subjects, which policies, when adopted and made local law, enter into and form parts of the contracts and dealings of their respective citizens. On such subjects, that is, subjects not embraced within the sphere of National legislation, it cannot in any true sense be said that the United States *has any public policy*. It is not the *censor morum* of the citizens of the States. Its courts can have no *judicial policy*, such as the State courts have and are constantly declaring; and certainly it cannot be said that the Federal courts have and are controlled by one public policy in one State and another and different public policy in another State. To so say would be to say that the Federal courts may have as many different public policies as there are States in the Union; but that would be absurd.

Now, whether or not the sale and transfer in good faith and for value by one citizen of a contract of insurance which he has honestly obtained and holds upon his own life, to another who has no interest in the continuance of his life, be good or bad, is more a question of *policy* than of principle. Certainly there is no principle of the common law which forbids such a transfer, for it has permitted, time out of mind, transfers of remainder and reversionary interests and expectancies without restriction as to the relation of the purchaser to the life tenant or ancestor—where the *principle* is essentially the same. On the policy of sustaining such sales and transfers, about three-fourths of the States of the Union which have spoken on the subject, as we have shown, have declared themselves in the affirmative.

Upon what principle, then, shall it be said that a Federal

court, sitting in one of these majority States, and in a suit between its citizens involving such an assignment made and consummated within the State in such way as to be entirely valid and binding according to its law and policy, should declare the assignment void and take away from one of the parties a valuable property right awarded to him by the laws of his State?

It is conceded that the assignment in question is valid by the laws of Tennessee. Have we two sets of laws in Tennessee applicable to contracts of this kind—a State law by which they are good, and a Federal law by which they are bad? Under such a condition, with what certainty could the citizens contract in such matters? A policy holder might sell his policy to his neighbor, get the money for it, and then move over the State line into another State and bring suit in a Federal court in the State of his former residence and have his contract declared void. On the other hand, a policy holder may have carried his policy for twenty years, or fifty years, and become unable to carry it longer; he may be in want and suffering for the necessities of life; his policy may have a market value, if he could sell it freely and with assurance to the purchaser that he would secure and receive what he bought; but having no *relative*, within the insurable interest degree, able or willing to buy, and the general public, fearing that in some way they might get sued in the Federal court and lose all, may refuse to buy; the policy lapses and the holder dies in poverty, although it was a valuable and salable asset according to the settled laws of his State.

Numerous illustrations, not only of hardships but of positive deprivations of right, might be suggested which would result from the affirmation of the decision of the Court of Appeals in this case.

The law and policy of Tennessee, declared by its courts, sanctioning such assignments, are not in conflict with the Constitution, treaties or acts of Congress of the United

States, nor with any principle of the common law. They cannot be nullified or reversed by the Federal courts. They cannot be affected in any way by the decision of this case. They will remain the law and policy of the State irrespective of the result of this case. The situation is wholly unlike that of an appeal to the United States Supreme Court from a State court decision on a Federal question, where the final result may be a reversal of the State court on such question, and the establishment of a rule for guidance thereafter.

In a case like the present, passing by any question as to the binding force of the State law and policy upon the Federal courts, the latter should, we think, as a matter of comity and for the harmony and repose of the domestic affairs of the State, follow the State law and policy.

But we respectfully submit that the question goes deeper than this.

Was not the right of Grigsby, the assignee in this case, at the time of the commencement of this suit, to receive the proceeds of the policy then held by him, a *vested right under the constitution and laws of his State*? Undoubtedly so. The decisions of his State had for years sanctioned and upheld such contracts; and these decisions were not in conflict with any provision of the Federal Constitution, treaties or statutes.

How, then, can the Federal courts take from him this *vested right*?

The Federal Constitution declares that the *State* shall not do such a thing. Whence comes the *power* of the Federal courts to do that which the highest law of the land, in substance and spirit, declares shall not be done by any one?

These are grave questions, and they merit the most thorough consideration of this honorable court.

Aside from this constitutional aspect of the subject, the whole question comes finally to these alternatives:

1. The Federal judiciary must, on the one hand, follow State decisions upholding *contracts* and *vested rights* under laws based on the settled public policy of the States where the contracts are made, and in this way maintain consistency with the States respectively so long as they adhere to different local policies on the subjects involved; or

2. On the other hand, adopt distinctive "policies" of their own and force the States to conform to them, or to suffer the incalculable confusion, loss and inconvenience of having *two* policies prevailing in the State affecting *contracts* and *vested rights* under neither of which the citizen can ever be certain he will fall—and which will either preserve or destroy his property, according as he gets into a State or a Federal court.

That the former of these obvious alternatives should be adopted, does not seem to admit of question.

Respectfully submitted,

JNO. A. PITTS,
K. T. McCONNICO,
MONTAGUE S. ROSS,
Counsel for Petitioner.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1911

No.

A. H. GRIGSBY
PETITIONER

VS.

R. L. RUSSELL and LILLIE BURCHARD,
ADMINISTRATORS OF
JNO. C. BURCHARD, Deceased
RESPONDENTS

I.

May it please the Honorable Court:

This was a case in which the Insurance Company filed a bill of interpleader to settle the rights of the parties to the insurance money.

The statement of the case contained in the opinion delivered by the learned Court of Appeals contains such a comprehensive statement of the facts and proceedings in this case that it will not be necessary for me to do more than call the attention of the Court to this statement.

As appears from that opinion there is presented in this case but one important and controlling question—that is, *Can a life insurance policy lawfully issued and taken out by the insured, payable to his "Executors, Administrators or Assigns," afterwards, with the knowledge of the insurer, be lawfully assigned to one having no insurable interest in the life of the insured, and who obligates himself to pay the premiums then and thereafter to become due upon the policy, or is such a contract of assignment void as a wagering or speculative contract, and contrary to public policy?*

The United States Circuit Court of Appeals held the assignment to be invalid, and the case has been brought to this Court by A. H. Grigsby, the assignee by writ of error, and he has assigned the following grounds for the application for the writ of error.

(1) *The Circuit Court of Appeals erred in holding that the sale and assignment of this policy of insurance by the insured to the petitioner, under the circumstances revealed by the record was void.*

(2) *Conflicting decisions of the United States Circuit Courts of Appeals with respect to this question.*

(3) *The Circuit Court erred in holding that any provisions contained in the policy of insurance militated against the right of petitioner as assignee to receive the proceeds thereof.*

(4) That the Court erred in holding that the contract of assignment made in good faith in Tennessee was void as against public policy where the previous holdings of the highest Court of Tennessee is to the contrary.

In reply to these various assignments of error, and to the brief filed in support of the same, we will first discuss the question as to what law is applicable to the contract involved under the Fourth Assignment of Error.

I.

It is admitted that the policy of insurance issued by the Insurance Company to Burcham, constitutes a contract of itself, separate and distinct from the contract as assignment, and yet it forms the subject of the contract of assignment, with all of its terms and provisions.

It is also admitted that the law of the place of assignment will control in the determining the validity of the assignment, and this Court will render such decision as the Supreme Court of Tennessee should render if the case were pending in that Court.

But it is contended by defendant that this Court should and will exercise its independent judgment as to what is the law of Tennessee controlling the validity of the assignment in question, this being as we insist a question of commercial or mercantile law, or one of general jurisprudence, there being no statute to control the matter.

STATUTE LAW OF TENNESSEE.

It was contended by the assignee in the lower Court that this assignment was authorized, and is protected by the Code of Tennessee, Sec. 3516 (Shannon's), which is as follows:

“SEC. 3516. Bonds with collateral conditions, bills or notes for specific articles, or the performance of any duty shall be assignable.” (Oct., 1801, Chap. 6, Sec. 54.)

It has always been held by the Courts of Tennessee that this act did not enlarge the principle of negotiability as it existed at common law, but merely enabled the assignee of an unnegotiable paper to bring suit in his own name, and obviated the necessity of notice of assignment.

- 1 Tenn., 385;
- 5 Yerg., 437;
- 3 Hump., 172;
- 3 Sneed, 49;
- 5 Sneed, 277.

It was held in the cases on *Insurance Co. v. Walters*, 5 Sneed. 269-277, and *Scobey v. Walters*, 10 Lea, 551, that insurance policies were covered by the provisions of this act, and that the insured had an assignable interest in the contract, under the common law as well as by the provisions of the act, but in neither of these cases

was the question of the insurable interest of the assignee involved, and under the facts stated no such question could have arisen.

It has never been assumed by the Supreme Court of Tennessee, and so far as we know never supposed by the bar, that the statute could be held to qualify a person to become assignee who is disqualified by law, or forbidden by public policy from taking such an assignment.

In four cases in Tennessee in which questions of the validity of an assignment of a life policy was involved, it was never intimated by the Court that this statute had any bearing on the question whatever, but on the contrary the question was determined under the general laws of insurance applicable to the question.

Quinn v. Catholic Knights, 15 Pick., 80;

Clement v. Ins. Co., 17 Pick., 22;

Bendet v. Ellis, 12 Cates, 276;

Lewis v. Edwards (Ms. Op.).

In the case of *Clement v. Ins. Co.*, *supra*, Judge Beard, in delivering the opinion, said:

“There is nothing in the policy as to who may be beneficiaries, nor as to whom assignments and transfers may be made, but it is clear they may be made at the risk of the parties. We are therefore relegated to the general law of insurance to determine whether such transfer and assignment can be sustained.”

The section of the Code referred to is one that is common to most of the States of the Union, in many of which the question of the validity of such an assignment has arisen, and in no one, which we have found, has it been held that the statute was authority for such an assignment.

In the case of *Franklin Ins. Co. v. Hazard*, 13 Amer. Rep. (Ind.), 313, the Supreme Court of Indiana, where they had an identical statute to the Tennessee act, said:

“The statute cannot be held to qualify a person to become assignee who is disqualified by law, or forbidden by public policy from taking such an assignment.”

In the case of *Brennan v. France*, 142 P. St., 301, where the validity of an assignment of a life policy was involved, with regard to a similar statute, the Supreme Court of Pennsylvania held that it did not authorize an assignment to “one forbidden by law to take such an assignment.”

So, also, in case of *Insurance Co. v. Lane*, 151 Fed. Rep., 276, under a statute even more explicit, it was held not to authorize a transfer to one forbidden by law to take such an assignment.

The Court of Appeals held with us on this proposition, and no assignment of error specifically objecting to this action of the Court has been filed or discussed in the brief.

DECISIONS OF THE SUPREME COURT OF TENNESSEE.

It is insisted that the decisions of the Supreme Court of Tennessee show a settled and fixed policy of that State to treat such contracts of assignment as valid, and not contrary to public policy, and that these decisions are binding upon this Court.

It is denied there has been a settled and fixed line of decisions in Tennessee upholding such an assignment as the one in question, but on the contrary the decisions are conflicting.

In the brief filed to support the petition in this case, counsel have referred to quite a number of cases which it is insisted are authority for the validity of the transfer in question.

In not a single one of the cases down to the case of *Quinn v. Catholic Knights*, 15 Pick., 80, was the question of insurable interest of the assignee raised or discussed, nor were there facts in any of the cases cited, prior to this case, upon which such a question could arise, and therefore we insist they furnish no authority for the statement made in the brief. We briefly notice the cases which do bear on the question at issue.

QUINN v. CATHOLIC KNIGHTS, 15 PICK., 80.

Quinn was a member of Catholic Knights of America and had issued to him a benefit certificate payable to his wife for \$2,000.00, conditioned on his payment of dues and assessments. These payments becoming burdensome, he agreed with Carter if he would repay to him the amount paid out by him, and also pay all future dues and assessments, that (his wife assenting) he would assign to him, Carter, the benefit certificate already issued, or else deliver to the society the old one and cause a new one to issue in which Carter should be named as beneficiary. The old certificate was surrendered, upon an order endorsed thereon, directing the issuance of a new one, to which the wife gave her assent. Instead of pursuing this course for some undisclosed reason, Quinn being in arrears, was suspended, and in this mode the work of substituting Carter was accomplished, a new certificate being issued to him as beneficiary, he having paid all back dues and assessments as agreed upon.

After the death of Quinn, the society, over the protest of the widow, paid the money to Carter and the widow filed this bill against Carter and the company to recover the amount of the policy.

Judge Beard, after saying that it was not necessary for the Court to range itself on either side of the majority or minority rule, says, page 85:

"The question rather is, will this Court sustain the title of an assignee when the assignment of the policy follows upon the negotiations already detailed, and *where the assignee, of his own means in fulfillment of a promise contemporaneous with its issuance, keeps it alive in his own interest and simply as a matter of pecuniary profit.* We have no hesitation as to the proper answer to this question; such a transaction is purely speculative on the part of the assignee, entered upon by him as a wagering interest, from which the largest profit is to be derived from the termination of the insured's life, and heaviest loss accrue from long continuance; a transaction of this character is obnoxious to law, as violative of a sound public policy."

(The italics are ours.)

But the Court held that the conclusion reached did not invalidate the policy. That Quinn had an insurable interest in his own life and under the rules of the society was entitled to his certificate, so that a Court of Chancery would not necessarily repel the parties, but would treat the case as one in which the assignee had no legal right to the proceeds of the policy beyond the amounts advanced by him, and for the moneys received beyond that sum he was liable to account to the representatives of the deceased. It was the agreement between Quinn and Carter, the assignment itself which was held to be obnoxious to law, not because they had caused or procured to be issued a wagering policy, but because their agreement was itself a wagering agreement. The policy was held to be valid,

and this notwithstanding the fact that the association participated in the contract.

It will be noted in this case that the Supreme Court of Tennessee, on page 84, classes this Court as holding that a policy once validly issued cannot afterwards be assigned to one having no insurable interest.

CLEMENT v. INSURANCE CO., 17 PICK., 22.

The policy involved in this case was issued in pursuance to a contemporaneous agreement that it should be assigned to Clements in consideration of the payments by him of the premiums accruing thereon, and also the payment of the premiums upon another policy of \$2,000.00, payable to the wife. Suit was brought by the assignee against the Insurance Company and one of the grounds of the defense was that the contract was void on account of the facts stated.

Judge Wilkes said:

"But the weight of authority is that where the insured contracts directly with the insurer, *paying the premiums himself*, he may designate as beneficiary one having no insurable interest in his life. So also the weight of authority is that where a policy has once been issued to a beneficiary legally entitled, he may assign it to another who has no insurable interest, by transfer in his life time, or by a last will and testament, but while this is true the transfer *must be made*

in good faith and not as a mere colorable evasion of the provisions in regard to wagering contracts, and in order to validate or legalize the same."

(The italics are ours.)

The Court held the policy to be void, and repelled the assignee from Court.

This was a suit directly between the assignee and the Insurance Company, and the assignment was only a collateral question as affecting the contract of insurance, and it was held that the assignee could not recover.

The next published case is *Bendet v. Ellis*, 12 Cates, 276.

This was a contract between the representatives of the person whose life was insured, and the assignee of the policy taken in pursuance to an agreement contemporaneous with the insurance of the policy. The Insurance Company having by consent of parties paid the proceeds to a trustee to be held for the person entitled to the same. By the agreement between the parties, the assignee was to pay all the premiums, and pay the widow one tenth of the policy on the death of the insured.

Judge Neil, after quoting at considerable length from the case of *Quinn v. Catholic Knights*, *supra*, says: "The present case falls directly within the authority of that case."

But he cites additional authorities to sustain the opinion in that case, and notably certain cases from the Supreme Court of Pennsylvania, which we will hereafter refer to more particularly, and he then makes the following quotation with approval thereof, from *Tate v. Commercial Building Association*, 97 Va., 74 (45 L. R. A., 243; 75 Amer. St. Rep., 770).

“To allow one to retain the proceeds of a policy of insurance, if the insurance company chose voluntarily to pay it, which was effected directly for his benefit upon the life of another in which life he had no insurable interest, whether the policy was issued upon the life directly for such beneficiary, or for the benefit of the insured and then assigned by him to the beneficiary, would encourage speculation upon the chances of human life with a direct interest in its early termination, contrary to public interest, and in contravention of the policy of the law. The denial of all right in the beneficiary to retain in such case more than is necessary to reimburse him for premiums paid and expenses incurred dissipates all hope of profit, and removes the temptation to speculate in insurance upon human life.”

Referring to the case of *Clement v. Insurance Company, supra*, the Judge said that was a case between the assignee and the Insurance Company in which it was held “the policy was void in its inception, but whether the insured could recover under the rule of public policy was not decided in that case, and could not be.”

Now we contend that these cases establish as a matter of public policy that speculative contracts based upon the chance of human life in which the assignee has a direct interest in its termination, are contrary to public interest and in contravention of public policy, and in the absence of any other authority, upon the principles announced in these cases we insist that as a logical conclusion, upon the reasons stated in the cases, an assignment of a policy whenever made to one having no insurable interest in the life of another, under a contract whereby the assignee is to take possession of the policy and pay all the premiums on the policy, thereby giving him an interest in the early termination of the life of the insured, would be held void as to any excess over the amount actually advanced.

But after the decision in the *Clement case*, and before that of the *Bendet case*, there was another case decided by the Supreme Court, which singularly enough is not even referred to in the latter case, although it had a direct bearing on the discussion in this latter case. We refer to the case of *Edwards v. Lewis* (Ms. Op.).

This was a suit directly between the representative of the insured and an assignee of a policy which had been taken out by the insured and maintained by him for some time, and later assigned by him to one who it is claimed had no insurable interest, and the assignment was sustained.

Unfortunately the only opinion which was ever filed in

the case was that of the dissenting Judge, Judge Neil, with whom Judge McAlister concurred, and even this opinion has disappeared from the record, so that this Court cannot see upon what facts the Court decided the case or the grounds of its decision, outside of the general order entered in the case. It was a divided Court, three of the Judges concurring in reversing the majority decision of the Court of Chancery Appeals, which Court was also divided two to one.

While that decision was undoubtedly conclusive between the parties to the litigation, we affirm that it cannot be relied upon as establishing the position contended for by the assignee in the case at bar. Upon a question so vital and effecting so many, if the Court had considered that it was to be taken as a declaration of public policy, it does seem that it would not have withheld its opinion from publication.

Our understanding of the case is that the opinion which was filed by Judge Neil after reviewing all the decisions of the State and general authorities bearing on the question, held that the contract of assignment was invalid, and the complainant was entitled to recover, but at the conclusion of his opinion he stated that the majority of the Court did not concur in these views, but were of opinion that the rule in New York would control.

But allowing to the decisions of the Supreme Court of

Tennessee all that is claimed for them by counsel for the assignee in the case at bar. Upon a question so vital and effecting so many, if the Court had considered that it was to be taken as a declaration of public policy, it does seem that it would not have withheld its opinion from publication.

This was the opinion reached by the learned Court of Appeals in the opinion in this case, and as we insist is fully sustained by the authorities cited by the Court as well as many others not mentioned.

It is insisted in the brief of opposing counsel on file with the petition, that this question was summarily disposed of by the Court of Appeals, and an earnest plea is made to the Court on the grounds that confusion must arise from having conflicting decisions of equal weight in the same jurisdiction. But the brief goes even further and challenges the right of this Court to disregard the decisions of the State Court upon the ground that it would destroy and take away a vested right.

The difficulties suggested are not new to this Court, since the first organization of this Court the same argument has been made time and again, and the same reason advanced, except perhaps that it is the first time so far as we have been able to see, that it has been urged that decision by this Court adverse to the State Court would destroy a vested right. This contention assumes the very question in issue—that is, whether any right had vested.

The difficulties referred to grow out of the dual character of our government, and the existence in the same territory of two coördinate jurisdictions. It has been said that it would be a dereliction of duty for the Federal Courts to fail to exercise an independent judgment in all cases when the judgment of that Court has not been foreclosed by a previous adjudication in that class of cases in which this Court has acknowledged the superior right of the State Court to determine, that is to say as to "State constitutions and statutes, and the construction thereof, and as to rights, titles and things having a permanent locality." (*Swift v. Tyson*, 16 Peters, 1.)

In order to avoid as far as possible the confusion arising from such conflicting decisions, as well said by Mr. Bradley in *Burgess v. Seligman*, 107 U. S., 20-33, mutual respect and deference should be exercised by each Court, and while exercising an independent judgment, this Court will lean to the judgment of the State Court, yet in that case the Court refused to be bound by the decision of a State Court construing a statute of the State adverse to the decision of the Circuit Judge, after the decision of that Court had been rendered.

Now, as we shall attempt to show hereafter, this Court had already determined the very question involved here against the validity of an assignment of a policy to one having no insurable interest. And this fact had been brought to the attention of the Supreme Court of Tennes-

see, and is noticed by that Court, in the case of *Quinn v. Catholic Knights*, 15 Pick., 83, in which this Court is said to hold such assignments invalid, and the case of *Warnock v. Davis*, 104 U. S., 775, is cited to sustain this view and also *Langdon v. Ins. Co.*, 14 Fed., 273.

Upon what principle, therefore, can an appeal on the grounds of comity be now made to this Court, and why should this Court be asked to reverse its former holdings in order to conform them to a later opinion of the State Court, especially where the adverse opinion cannot be produced nor the reasoning of the Court nor the facts of the case seen or considered.

This Court will not, except it be in a case where the decision of the State Court is imperative, reverse its own holdings to conform them to a decision by the State Court.

Mohr v. Manieva, 101 U. S., 417;

Burgess v. Seligman, 107 U. S., 20;

Rowan v. Runnels, 5 How., 134.

LAW OF THE CONTRACT.

Opposing counsel have devoted much space and cited many authorities to the effect that the validity of an assignment is to be determined by the law of the place of contract. As we do not controvert this proposition, it would be useless consumption of the time of the Court to discuss the question, except to call attention of the Court

to the case of *Ogden v. Saunders*, 12 Wharton, 214, from which an extract is taken and a deduction drawn by the counsel, which we think is not sustained by the opinion—viz, that the decision of the State Court will govern the contract whenever its performance is sought to be enforced.

That was a case involving the validity and construction of a State bankrupt act as affecting and impairing the obligations of a contract, and did not involve a question of general jurisprudence where there might be a diverse holding as to what was the law of the State, as between the Federal and State Courts.

Counsel loses sight of the fact that the Federal Court equally with the State Court has the power to determine what is the law of the State.

In the case of *Pritchard v. Norton*, 106 U. S., 124, cited by counsel, there was a conflict of law as between the State of New York and the State of Louisiana, growing out of the construction of statutes in both States and the decisions of the State Courts thereon. A case in which the statutes and the decisions of the State Courts thereon was the paramount law. It was purely a question of conflicting jurisdiction, and the Court held that it would, and it did decide the case as the Louisiana Court should have done, had it been brought before that Court. Just as this Court will now decide this case as the Su-

preme Court of Tennessee should decide it in pursuance to the laws of that State as this Court shall ascertain such law to be in the exercise of its own independent judgment.

In the case of *Smith v. Alabama*, 124 U. S., 478, Judge Matthews said:

“A determination of what law is may be different in a Court of the United States from that decreed in the tribunals of the particular State. . . . But the law as applied is none the less the law of that State.”

This is the view taken by the Court of Appeals in an opinion fully covering the question.

DECISIONS OF STATE COURTS AS TO QUESTIONS CONCERNING CONTRACTS OF INSURANCE NOT BINDING.

It remains to ascertain whether or not questions relating to insurance contracts and assignments thereof are matters of such general jurisdiction as that the Federal Courts will exercise an independent judgment. We affirm that they are, and that the assignment of such contracts are as much a matter of general jurisdiction as are the contracts of insurance themselves, quite as much so as was the acceptance of a bill or draft which was involved

in *Swift v. Tyson*, 16 Peters, 1, and we cite the following cases to sustain this position:

Scott v. Sandford, 19 How., 603;

Washburn v. Ins. Co., 179 U. S., 1;

Swift v. Tyson, 19 Pet., 1;

Gordon v. Ware, 132 Fed., 44;

Ins. Co. v. Lane, 151 Fed., 276;

New Dig. of U. S. Rep., Vol. 2, p. 2332, sec. 1690.

And we might add that the Supreme Court of Tennessee holds that the question of the validity of the assignment of a policy of insurance is one of general insurance law, and not one of a local character.

Clements v. Ins. Co., *supra*.

The case of *Gordon v. Ware*, 132 Fed., 444, which is so strongly relied upon by plaintiff's attorney on another proposition, expressly holds that the question of the validity of an assignment of a life policy is one upon which the Federal Court should exercise an independent judgment, and it would be derelict in duty if it failed to do so.

PUBLIC POLICY.

Public policy is that principle of law which holds that no citizen can lawfully do that which has a tendency to

be injurious to the public or against public good, and questions of public policy arise out of and are determined by common law principles.

People v. Chicago Gas Co., 8 L. R. A., 497;

Craft v. McConnochy, 22 Amer. Rep., 171;

Gibbs v. Consolidated Gas Co., 130 U. S., 409;

Fowler v. Park, 131 U. S., 88;

Oregon Steam Co. v. Winsor, 87 U. S., 64;

Hagar v. Reclamation District, 111 U. S., 704;

L. & N. R. R. Co. v. Palmer, 109 U. S., 244.

In *Hartford Ins. Co. v. Chicago, M. & St P. R. R.*, 175 U. S., 90, there was a question of public policy involved, and the Court held in that case it was a question for this Court to settle upon its own independent judgment when the question was one of commercial or mercantile law or of general jurisprudence. Mr. Justice Gray, in delivering the opinion of the Court, says:

“Questions of public policy as effecting liability for acts done, or upon contracts made, and to be performed within one of the States when not controlled by the constitution, laws of, or treaties of the United States, *or by principles of commercial or mercantile law, or of general jurisprudence of national or universal application* are governed by the law of the State as expressed in its own constitution or declared by its highest Court.”

(The italics are ours.)

It will be thus seen that upon questions of public policy as applicable to commercial or mercantile law, or of general jurisprudence of national or universal application, this Court will exercise an independent judgment; questions of this character are expressly excluded from the class of cases in which the decisions of the State Court are held to be paramount.

We have consumed what may seem an unnecessary time in discussing the question of the applicatory law to the contract involved, but we were induced to do so by the strenuous and earnest argument contained in the brief of opposing counsel, and because it was intimated that the learned Court of Appeals had not properly considered the case, but in the language of the brief had summarily disposed of the question, notwithstanding that Court had fairly and fully stated the questions, and determined them, citing in each instance the authorities sustaining the opinion given by the Court, the learned Judge saying with reference to the decision of the State Court in the *Edwards v. Lewis case*, that “ we feel less reluctance in reaching a different conclusion because there seems to be no settled line of decisions in that State.”

We might add, as was said by one of the Justices of this Court in another case, the decision in the *Edwards case* was obtained “by a very slight preponderance of judicial suffrage.”

DO THE TERMS OF THE POLICY ITSELF FIX
AND LIMIT THE AMOUNT WHICH THE AS-
SIGNEE MAY RECOVER TO HIS INSUR-
ABLE INTEREST?

This is made the subject of the Third Assignment of Error in this Court. The policy provides as follows:

“Any claim against the Company, arising under any assignment of this policy, shall be subject to proof of interest.”

It is contended by appellants that this provision was one alone for the benefit of the Company, and which might be and was waived by the payment of the fund into Court by the Company. On the other hand it is the contention of the administrator that it is a term of the policy defining and limiting the amount to be paid the assignee, and that it was this contract which was assigned, and with it the right to receive the stipulated amount that is the extent of his insurable interest, and no more.

The learned Court of Appeals was of opinion, and so held, that the clause “was not inserted solely for the benefit of the insurer, but was in recognition of public policy in respect to an insurable interest.” Of which Burchard and Grigsby must be taken to have knowledge.

We think it might be further added that in the making of the original contract this paragraph was inserted in

recognition of the settled decisions of the Pennsylvania Courts that the assignee of a life policy could only recover to the extent of his insurable interest, and by thus expressing this law in the contract it became a concrete term thereof. In fact, by the very terms of the policy it is provided that it is a Pennsylvania contract.

We cite in this connection the following cases from the State of Pennsylvania which not only hold that an assignee cannot recover in excess of his insurable interest, but further hold that if he does collect in excess of that amount, he will be compelled to disgorge, at the suit of the representatives of the assured.

Brennon v. France, 142 Pa., 301;

Van Ormer v. Hornberger, 142 Pa., 579;

Hoffner v. Hoke, 122 Pa., 377;

Gilbert v. Moose, 104 Pa., 74;

Downey v. Hoffer, 110 Pa., 109.

We are content to rest this question upon reasons and arguments embraced in the opinion of the learned Court of Appeals, it is there said:

“Undoubtedly the contract of insurance in the case at bar was valid, the only question is the legal effect of its subsequent assignment. The invalidity of that need not in any way effect the liability of the insurer to the representatives of the assured. Hence it is that the payment of the policy into Court has no effect upon the legal or equitable rights of the rival claim-

ants to the proceeds. The Company was liable in any event to somebody unless some term of the contract made the claim uncollectible at all in case of an assignment. That is not the case here for the clause making the claim of an assignee subject to proof of interest, would only limit the recovery of the assignee to a sum measured by his insurable interest and leave the Company liable to the representatives for the rest."

DID THE CIRCUIT COURT OF APPEALS ERR IN
HOLDING THAT THE ASSIGNMENT OF
THIS POLICY OF INSURANCE BY THE IN-
SURED TO THE PLAINTIFF IN ERROR
UNDER THE CIRCUMSTANCES WAS IN-
VALID?

This is the substance of the first Assignment of Error, and presents the real and most vital question in issue, as to which we have endeavored to show, this Court will exercise an independent judgment.

In view of the very able and exhaustive treatment of this question in the learned opinion of the Court of Appeals, we feel a great reluctance to further discuss the question, but since opposing counsel have so persistently and zealously attacked this opinion as being contrary to the previous holdings of this Court, we feel warranted in reviewing briefly the different decisions of this Court.

Cammack v. Lewis, 15 Wall., 643.

This is the first case we have found decided by this Court that even remotely bears upon the question at issue.

The facts briefly stated as they appear in the reported case were as follows: Lewis being indebted to Cammack in the sum of \$70.00, at the suggestion of the latter, procured a policy of insurance on his life for \$3,000.00, under an agreement as recited in the answer of Cammack that he, Cammack, was to pay the premiums for seven years, the life of the policy, and if Lewis should die during this period, Cammack out of the proceeds of the policy would pay to the wife and heirs of Lewis one third, he retaining two thirds. Lewis died very shortly after the issuance of the policy, and under an agreement made with the widow Cammack collected the amount of the policy, \$3,000.00, and paid the widow \$1,000.00 less \$50.00 paid for the premium and a small account.

At a subsequent date, having taken out letters of administration on her husband's estate, she brought the suit against Cammack to recover the balance of the policy, \$2,000.00.

Mr. Justice Miller, who delivered the opinion of this Court, said:

"If the transaction as set up by Cammack be true, then so far as he was concerned it was a sheer wagering policy and probably a fraud on the Company. To procure a policy for \$3,000.00 to cover a debt of \$70.00 is of itself a mere wager."

Again it is said:

“Under these circumstances we think that Cammack could in equity and good conscience only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterwards make on account of it, and that the assignment to him was only valid to that extent.”

The Court will observe that it was only the contract between Lewis and Cammack that was involved, the Insurance Company had cancelled its obligation by payment. The Company so far as the record shows was ignorant of the real facts, indeed it was intentionally deceived as may be inferred from the opinion. The question was whether in equity and good conscience such a transaction as the one disclosed between the two should be allowed to stand, and the Court held it to be invalid except as security for the debt and premiums advanced, not because the contract was made contemporaneously with the taking out of the policy, and as affecting the validity of the policy, but because of the inherent vice in the contract between Lewis and Cammack.

The two cases following are relied upon by opposing counsel as sustaining their contention, and are sometimes cited to that effect by law writers, and in the opinions of several Courts.

Connecticut Mutual Life Insurance Company v. Schaefer, 94 U. S., 457.

The policy in this case was issued upon the joint lives of George Schaefer and wife, payable to the survivor, on the death of either, they were subsequently divorced. The wife kept the policy and paid the premiums on it to the Company, and her former husband having died first, she brought suit against the Insurance Company. One of the defenses was that the marital relation having been terminated by the divorce, the plaintiff who had married again, no longer had an insurable interest in the life of her former husband, and was therefore not entitled to recover. The Court held adversely to the contention of the Company.

The mere statement of the case should be sufficient to convince one that there could be no similarity between that case and the one at bar, the questions involved in each case are, and as we insist were, determined upon entirely different principles.

But opposing counsel have seized upon certain expressions or phrases in the opinion, and having taken them from their proper setting have given them an entirely different meaning from that which appears from the context of the opinion. Of course the contract under dispute was the policy itself, and not any collateral agreement. Indisputably it was a valid contract when made, and no new parties had intervened. There was nothing in the terms of the policy covering the conditions which subsequently arose to relieve the Company from liability, and by its terms it was payable to the plaintiff. In the absence

of such stipulation the Company could not escape liability, as the Court held.

Mr. Justice Bradley, who delivered the opinion of this Court, opens the discussion of the question with this terse statement:

“It is generally agreed that mere wager policies—that is, policies in which the insured has no interest whatever in the matter insured, but only an interest in its loss or destruction—are void as against public policy.”

The learned Judge then proceeds to discuss what interest is necessary to take a policy out of the category of a mere wager, and says:

“The essential thing is, that the policy shall be obtained in good faith, and not for the purposes of speculating upon the hazards of a life in which the insured has no interest.”

The Court reached the conclusion that the policy in question might be sustained upon the grounds that it was a joint policy, “without reference to any other interest,” but in any event that the wife had an insurable interest at the time the policy was taken out, and then held:

“That a policy taken out in good faith and valid at its inception is not avoided by the cessation of insurable interest, unless such be the necessary effect

of the provisions of the policy itself. Of course a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred, and in cases where the insurance is effected merely by way of indemnity as when a creditor insures the life of his debtor for the purpose of securing his debt, the amount of insurable interest is the amount of his debt."

"But supposing a fair and proper insurable interest of whatever kind to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is no good reason why the contract should not be carried out according to its terms."

There is contained in the syllabus to this opinion this statement:

"Any person has the right to procure an insurance on his own life, and assign it to another, provided it be not done by way to cover for a wager policy."

Though we have examined this opinion with the most careful scrutiny we have been unable to find in the opinion itself a corresponding statement, but this does not change the effect of the general opinion, nor does it in the least effect our contention. We do not dispute the right to assign a policy properly taken out, but our contention is that the same principles of law and public policy apply to the assignment of a policy regularly taken

out in good faith which control the taking out of the original contract.

It was the policy itself to which the learned Judge was referring when he said that if taken out in good faith with a proper insurable interest, it could not thereafter be defeated. Against this holding we have never made the slightest contention.

AETNA INSURANCE COMPANY *v.* FRANCE, 94 U. S., 561.

In this case the policy on the life of Chew was made payable to his sister, Lucetta France, to whom he was indebted, and who advanced money to pay the premiums on the policy, taking the receipts therefor in his name. The insurance company declined to pay upon two grounds: want of insurable interest, and misrepresentation and breach of warranty as to age and health. It was held that the sister did have an insurable interest in the life of her brother "on account of the nearness of the relationship between the parties, and especially as Mrs. France, at the time of the issuance of the policy was one of the next of kin, prospectively interested in his estate as a distributee."

It having been determined that there was no misrepresentation or breach of warranty, this was conclusive of the case. Mr. Justice Bradley, however, added this:

"As held by us in the case of *Connecticut Mutual Life Ins. Co. v. Schaefer*, *supra*, 457, any person has

a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a valid and good consideration in law for any gift or grant, the transaction is entirely free from imputation. The direction of payment in the policy itself is equivalent to such an assignment."

The Court expressly couples the assignment with the issuance of the policy, and is considering its effect upon the policy, treating the stipulation in the policy to pay the sister as an assignment. And it was the relationship existing between the parties which constituted a good and valid consideration for the gift or grant and freed it from the imputation of fraud or being a wagering contract, for, says the Court:

"The contract of insurance as correctly construed by the Court was made with Chew, and the relationship of the parties was such as to divest the assignment of all semblance of a wagering transaction."

Again the Court adds, after quoting again from the opinion of Chief Justice Shaw, as he had in the opinion in the *Shaefer case*, *supra*:

"The case is divested of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it."

It is difficult to imagine how this opinion can be tortured into a holding that an assignment of a policy by which the assignee would acquire a merely speculative interest in the death of the assignor, without any interest in his life to counterbalance it, would be valid regardless of the time when the assignment is made. In either case the reason and policy of the law would be the same.

The case of *Page v. Burnstine*, 102 U. S., 664, was a case of assignment of a policy regularly and properly issued to the person whose life was insured, and subsequently assigned by him by written transfer purporting on its face to be absolute, just as the transfer in the case at bar is absolute on its face. The effect of which was to invest Burnstine with the entire control of the policy and with authority to receive the proceeds of the policy upon the death of Page. It was contended by Burnstine that the transfer was absolute and without reservation of any interest to Page, and that he was not liable for an accounting.

The Court said:

"Upon the merits of the case we waive any consideration of the question suggested in oral argument as to whether Burnstine could consistently with public policy acquire by assignment any interest in the insurance upon the life of Page beyond such amount as the latter actually owed him at his death. No such question is raised in the pleadings nor was it considered in the Court below."

■

But the Court construed the assignment notwithstanding it was absolute on its face as simply appointing Burnstine upon the death of Page to receive the amount due from the company, and after reimbursing himself, to pay the remainder over to the persons entitled, and adds:

“A different construction of that instrument would place Burnstine in the position of being pecuniarily interested in the death of Page. Unless compelled to do so, we should not suppose that he had any desire or purpose to speculate upon the life of Page or to do more than secure the repayment of the money actually loaned by him to the assured.”

If Mr. Justice Harlan, who delivered this opinion, had understood the two cases just cited above as establishing the doctrine as contended, that a policy once validly issued may be transferred at will regardless of the insurable interest of the assignee, then the language of the opinion just quoted was inappropriate.

Warnock v. Davis, 104, U. S.

The facts in this case necessary to be stated are as follows: policy of \$5,000.00 on his life, and on the same day made an agreement with the Sciota Trust Company, reciting the fact of his application for insurance, and by which that company agreed to pay all the premiums upon the policy in consideration that nine-tenths of the policy when collected upon the death of Crosser should be retained by the associa-

tion and one-tenth should be paid to the widow of Crosser, and in case of her death to such person as he should designate. On the same day the policy of insurance was issued and after its issuance Crosser executed an assignment of the policy to the association in pursuance to the previous agreement. It is not stated that the insurance company had any knowledge of the agreement between Crosser and the association. The amount of the policy, \$5,000.00, was collected by the association, of which \$500.00 was paid over to the widow, less certain sums due under the agreement, and the suit was brought to recover the balance.

The defendant relied upon the agreement to defeat the action. The opinion of the Court was delivered by Mr. Justice Field, who said:

“The policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the association as security for any sums lent to him or advanced for the premiums and assessments upon it. But it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculative contract upon the life of the assured, with a direct interest in its early termination.”

The Court then concludes a discussion as to what is necessary to constitute an insurable interest with this statement:

“But in all cases there must be a reasonable ground founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefor independently of any statute on the subject condemned as being against public policy.”

“The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name.”

The Court referred to the case of *Franklin Ins. Co. v. Hazzard*, 41 Ind., 116, at length and with approval, in which case the policy had been validly and properly issued, and carried for some time when it became burdensome to the assured, who assigned the policy to another for a valuable consideration, who agreed to pay, and did pay the premiums. It was held by the Indiana Court that all the objections against issuing a policy to one upon the life of another in whose life he has no insurable interest exist against holding such a policy by mere assignment, or purchase, and Mr. Justice Fields concludes his reference to that case with this quotation from the opinion:

“‘In either case,’ said the Court, ‘the holder of such policy is interested in the death rather than the life of the party assured. The law ought to be, and

we think it clearly is, opposed to such speculation in human life.’ ”

The fact that the conclusions reached are in conflict with the view held by the New York Court of Appeals is noted, and it is recited that the Courts of that State hold that a valid policy of insurance once effected by a person on his own life is assignable like any ordinary chose in action, and the assignee upon the death of the assured is entitled to the full sum payable without regard to the consideration paid or the possession of an insurable interest.

This is the very contention now made, but said the Court in reply to this contention :

“If there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest, the same ground which invalidates the one should invalidate the other, so far at least as to restrict the right of the assignee to the sums actually advanced. In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life.”

It is difficult to see how there could be two opinions as to what the Court did decide, or intended to decide, or that

it could be insisted that the question was not fairly raised. In reply to this insistence before the Court of Appeals the learned Judge said:

“It is impossible with due respect for that tribunal to treat this opinion as mere *dictum*, to do so would simply be to say that the Court did not decide the case that was before them, but another non-existent case.”

Mutual Life Ins. Co. v. Armstrong, 117 U. S., 597.

This is one of the cases sometimes cited as sustaining the contention of the plaintiff in error.

The policy of insurance in this case was what is known as an endowment policy for \$10,000.00, payable to the assured if he lived the designated time—that is, December 8, 1897, or to his assigns, or if he should die before that time, to his legal representatives. It appeared in evidence that Armstrong, the assured, took no steps toward securing the policy except at the instance of Hunter, who was his partner. He submitted to an examination, and executed and assignment of the policy to Hunter in blank, which he left with Company's agent, and when the policy was issued, it, together with the assignment, was delivered to Hunter, who retained possession of the same. Within six weeks after the issuance of the policy Armstrong was murdered. Hunter was tried and convicted of this offense, and was hung.

The widow of Armstrong was qualified as administratrix

of his estate, and brought this suit against the Company to recover the amount of the policy. The defense was that the policy was procured by Hunter to cheat and defraud the Company, and the Company offered to prove that Hunter being at the time the sole owner of the policy, murdered the assured, but the Court excluded the testimony.

The trial Court among other things instructed the jury that the contract was divisible, and that part of the contract providing for payment to his legal representatives in case of death before the designated time was not assignable. That the term "legal representative" was a designation of the person who was to take, and restrictive in its character and the insured had no power to assign to any person. That his assignment only transferred the interest payable at the expiration of the policy.

As Armstrong did die before the expiration of the policy this charge effectively held the Company liable to the widow.

The first question, therefore, presented to the Court for determination was whether this charge was correct. The Court held that the provision for payment to his legal representatives in case of his death was intended to meet the contingency of his dying without having previously disposed of the policy, and that the term "legal representatives" was not a restrictive term, but was sufficiently broad to cover all persons who with respect to his property stood

in his place and represented his interest, whether transferred to them by his act or by operation of law.

It was in this connection the language relied upon as sustaining the contention of opposing counsel was used, as follows:

“A policy of life insurance without *restrictive words* is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to *cover a mere speculative risk*, and thus evade the law against wager policies, and payment thereof may be enforced for the benefit of the assignee, and under a system of procedure in many States, in his name.”

(Citing with other cases that of *Warnock v. Davis*, *supra*:

“The assignee here, Hunter, represented that he was the special partner of Armstrong, and had placed \$5,000.00 in the partnership, and was apprehensive that he might be charged as general partner. If he was a special partner the contract was not a wager policy.”

It was held the assignment carried to Hunter the whole interest of Armstrong, and that Hunter had a valid claim, and hence the proof offered was competent.

This was the whole of this case, the opinion was delivered by Mr. Justice Field, who had also delivered the

opinion in the case cited of *Warnock v. Davis*, that he understood that he was modifying or reversing his former decision is not imaginable, and it does not do so. He had held in the *Warnock case* that a policy is assignable as any other contract, provided the contract of assignment be not in the nature of a speculative risk on human life.

Crotty v. Insurance Company, 144 U. S., 621.

In this case the policy recited that it was payable to Michael O'Brian on the 15th of January, 1941, or if he should die before that time the Company was to pay said sum within ninety days to Michael Crotty his creditor, if living, if not then to O'Brian's Executors. O'Brian having died, Crotty brought suit on the policy against the Insurance Company. No proof was introduced on the trial. Crotty relying alone on the recitals in the policy and the fact that he was a creditor at the date of the policy.

Mr. Justice Brewer, who delivered the opinion of the Court, said:

"Without noticing other questions discussed by Counsel, it is sufficient to consider that of plaintiff's interest in the policy. It is the settled law of this Court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts in insurance have been repeatedly denounced."

The learned Judge quotes from the opinion in the *Schaefer case* that where a creditor insures the life of a

debtor "the amount of his insurable interest is the amount of his debt," and he further says:

"If a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor looses all interest therein, and the policy becomes one for the benefit of the insured and collectible by his executors or administrators."

We insist that the only legitimate conclusion which can be reached from the opinion of this Court in these various cases is that in whatever form presented this Court will not give effect to a mere speculative contract upon human life whereby a person acquires an interest in the early death of another without any counterbalancing interest in the prolongation of that life. The result of which transaction would have a tendency to create a desire for the death of the other.

III.

CONFLICTING DECISIONS OF THE UNITED STATES CIRCUIT COURT OF APPEALS WITH RESPECT TO THIS QUESTION.

This is made the second ground for assignment of error.

The cases referred to as sustaining contrary views are those of *Gordon v. Ware National Bank*, 132, Fed. Rep.,

444, opinion by Judge Sandford, in which it is claimed such an assignment was held valid. And the case of *Alexander v. Lane*, 157 Fed. Rep., 1002, in which the Court, in a memorandum opinion delivered by Judge Shelby, affirmed the decree and opinion rendered by District Judge Speer, under the style of *Mutual Life Ins. Co. v. Lane*, 151 Fed. Rep., 276, and the case now at bar in which such assignments are held to be invalid, except as securities for debts and advances.

The case of *Insurance Co. v. Lane* is exactly an all-fours case with the one at bar, and the able opinion of Judge Speer was approved by the Court of Appeals for that circuit.

The case of *Gordon v. Ware National Bank*, however, it is insisted by us, is an entirely different case, and one which, upon its merits, could not have been decided otherwise than was done, and was a case in which the question here involved was not as we conceive necessary to be decided, or even properly so.

The policy in this case was a paid-up policy, payable at the death of insured, an unconditional obligation. It was assigned to the bank as collateral security for a loan which exceeded the amount of the policy. The debt was not paid, and a bill was filed in Court against the insured and his wife, to whom the policy was payable, and who joined her husband in the pledge, to have the pledge sold, the husband and wife consenting, a decree was entered

and the sale was ordered, and the policy was sold under the decree of the Court, and purchased by the bank, to whom it had been pledged. The Court decreed that the defendants were forever barred of, and from having or claiming any interest in the policy. From this bank the policy passed by assignment to the Ware National Bank, the husband having died first, and then the wife, her administrator brought suit for the proceeds upon the ground that the assignees of the German Bank had no insurable interest in the life of Gordon, and that the policy remained the property of Melissa Gordon.

The bare statement of the case shows that after the assignment of the policy as security for a debt in excess of the policy, no interest was left in the assignors, and the subsequent assignments of the policy could not restore to Mrs. Gordon the rights, of which she, by her own act and the decree of the Court, had been divested.

Judge Sanborn states that the Supreme Court of the United States and the Courts of the great commercial communities had repudiated the old declaration of the Supreme Court of Indiana, and have adopted the more modern and rational rule, that any person has the right to procure an insurance on his own life and assign it to another, provided it be not done by way of an agreement for a wager policy.

That he should state that this Court had repudiated the declaration of the Indiana Court in the *Hazard case*, when

this Court had specially referred to that opinion and had quoted with approval the very declaration which he says was repudiated, is evidence that the learned Judge had not examined the cases with great care.

The learned Judge is equally mistaken when he asserts that the Court of Indiana had also repudiated its former declaration, citing *Milner v. Bowman*, 119 Ind., 448, 5 L. R. A., 95.

This was a benefit certificate in a Masonic Mutual Benefit Society, according to the by-laws of which any member was allowed to at any time change the name of his beneficiary. The certificate was first taken out payable to the heirs of the insured, they being at that time a mother and brother, both of whom died before he did. He then directed payment to be made to the plaintiff, Clara J. Bowman. He paid all the dues and assessments up to his death, and kept the policy in force, and there was no agreement or contract between him and the beneficiary named; it was simply a case of the designation by the assured of the intended beneficiary of his bounty, and it was in respect to this state of facts that the Court used the language which Judge Sanborn quotes as showing that Court had repudiated its former holdings.

And opposing counsel have fallen into the same error in citing the same case, and also a more recent, and, in fact, the last reported case from Indiana as repudiating the declaration in the *Hazard case* (we refer to the case

of *Davis v. Brown*, 159 Ind., 644), and names this State as one of those holding the majority rule, notwithstanding the learned Judge delivering the opinion in this case said, page 648 :

“The latter cases that we have cited are not out of accord with *Franklin Ins. Co. v. Hazard*, and *Franklin Ins. v. Sefton*, *supra*, although the two cases mentioned were cases where there had been an assignment of valid insurance to a third party, yet in each of these cases the fact appeared or was in effect charged that the person taking the assignment had engaged in a speculation as to the length of time the person would live whose life was insured. This Court is still of opinion that such a transaction is quite as obnoxious to public policy as where a third person without insurable interest effects an insurance on the life of another for his own benefit. But there can be no objection to a person taking an assignment of a policy that another has taken out on his own life, where the insured has covenanted to pay the premiums and where it is not contemplated that such third person will pay them.”

We affirm that with the single exception of the case of *Gordon v. Ware National Bank*, *supra*, there is not to be found in the books a single case reported from any of the Federal Courts in the Union where the question is raised or discussed that does not sustain our contention that the assignment of a policy to one having no insurable interest under circumstances which exist in the case at bar, is not

contrary to public policy and void, we cite the Court particularly to the following cases:

American Employers Liability Co. v. Barns, 68 Fed., 873;

Manhattan Life Ins. Co. v. Hennessy, 99 Fed., 64;

Fidelity Mut. Ins. Co. v. Jeffords, 107 Fed., 402;

Foster v. Accident Ins. Co., 125 Fed., 563;

Langdon v. Mut. Ins. Co., 14 Fed., 273;

Lamont v. Grand Lodge, 31 Fed., 177.

The two cases last mentioned were decided by members of this Court, and may be assumed to have reflected the views of this Court.

In *Langdon v. Ins. Co.*, Mr. Justice Brown uses this language:

"It is now well settled in the Federal Courts that a party cannot take out insurance on his own life and assign the policy either contemporaneously with its execution, or subsequently, to a person having no legal interest in his life, although the decisions of the State Courts on this point are conflicting."

In the case of *Lamont v. Grand Lodge*, Mr. Justice Shiras said:

"Public policy requires that a person having no insurable interest in the life of another shall not be per-

mitted to speculate on such life, and thereby become interested in its early termination. . . . To prevent the evils resulting from allowing persons having no interest in prolonging the life of another to speculate on such life, the rule is adopted that one having no insurable interest shall not be permitted to contract either directly or indirectly for the payment of any sum upon the death of such persons."

It may be proper for us to say that in neither of the cases cited was it a case of assignment of policy such as exists in the case at bar, but the principles announced are of general application.

But Judge Sanborn also states as a further evidence of the public policy of the United States, that Congress had in the Bankrupt Act provided for the taking over by the assignee of a life insurance policy. But this Act does not authorize the sale of such a policy to one having no interest, it allows the insured to redeem the policy himself, or in the event of his failure to do so, the assignee in bankruptcy can only take the cash surrender value of the policy.

In *Morris v. Dodd* (Ga.), 50 L. R. A., 33, it was held that a policy of insurance, though payable to the legal representatives of the assured, does not, if it have no cash surrender value, vest in the assignee in bankruptcy as assets of the estate, and see the notes.

See also the case *In re White*, 26 L. R. A., 451; 174

Fed., 333, and notes. If it be the law that a policy is assignable as any other chose in action to any person, why not allow the assignee in bankruptcy to realize the most he could.

CONFLICTING DECISIONS OF STATE COURTS.

To attempt a review of the various conflicting decisions of the State Courts would be not only a tedious but a profitless task, and the task of harmonizing them an impossible one. It is doubtless true that the preponderance in number of judicial decisions (but not the weight of opinion) is in favor of the assignability of a policy to one having no insurable interest. Several of the cases relied upon by plaintiffs counsel as holding the assignability of such contracts, only go so far as to hold that the rule should not be a hard and fast one, so as to defeat an absolute and positive equity, and upon the facts presented in those cases, might well have been decided upon different grounds in favor of the assignee. In other cases as we shall attempt to show the reasons given as the basis for the opinion of the Court are utterly at variance with the long-settled principles established by this Court, and could not upon the same grounds be sustained without ignoring and setting aside the decisions of this Court. Many of the cases cited were between the assignee and the insurance company when the question of the accountability of the assignee to the administrator was not considered.

Mr. Justice Field, in the case of *Warnock v. Davis*, *supra*, recognized the existence of this conflict of decisions and he understood that the determination of the Court in that case was not (as is now contended) in harmony with what is termed the majority rule, as we have already shown.

The rule adopted by this Court does not absolutely destroy the assignment as was done in the *Hazzard case* from Indiana, but holds the assignment good as a security for sums actually advanced upon the contract and makes the assignee accountable to the estate of the insured.

The case of *Fitzpatrick v. Ins. Co.*, 56 Conn., 116 (9 Am. St. Rep., 288), one of the cases most insistently relied upon by opposing counsel, and most frequently cited in other cases to sustain the majority rule, was a suit brought directly by the assignee against the Insurance Company upon a policy which had been lawfully issued and in force three years before the assignment. There was nothing in the policy prohibiting the assignment, of which notice was duly given to the Company, and it had accepted payment of premiums with knowledge of all the facts. There was no intervention on the part of the husband or other representative of the assured. It was a straight contest between the Insurance Company and the assignee, in which the Company denied any liability under the contract, the question as to whether the assignee could be held liable to the representatives of the estate was not involved nor decided.

There could have been no dispute, even under our contention, that the assignee was entitled to be reimbursed for advances and expenses incurred under the contract of assignment.

The facts were that the assured who had been abandoned by her husband, and was in poverty, applied to the plaintiff, a woman and distant relative, for relief, and agreed to transfer the policy to her if she would give the insured a home and food and care in sickness; she did support and care for her, paying her medical expenses. The Court said:

“The law for the protection of human life will not permit the purchase of a wagering policy. *Will not permit a person to buy insurance upon the life of another* unless he has reasonable grounds for believing it to be to his pecuniary interest in some degree that the life of the insured shall continue, or that there should be ties of blood or marriage actual or expected.

. . . There is no good reason why the law should condemn an entire class of contracts, great in number, no more dangerous to life, and of equal capacity for good. The rule of law governing all other contracts would seem to be the proper one for these, to uphold those which are honest and beneficial, and annul all which are proven to be covers for fraud. The solicitude of the law is for the life of the insured. Upon the record Alice Galligher was a laboring woman living apart from her husband, and childless. If with her chose in action she could purchase from a distant relative a home and food for life with care in sickness,

we are unable to see why the law should forbid it. She was willing to trust her life in the keeping of that relative. We cannot see why the law should be more solititious for her than she was for herself."

Beyond all question, at least so far as the Insurance Company was concerned, the assignment was good, under any of the cases, as a security for all labor performed and advances made on the faith of that contract, and the subsequent assignment of a policy validly issued would not destroy the original contract, there being in it nothing to prohibit its transfer. But more than all, this case is a clear recognition of the doctrine that a contract of assignment may be held to be a wagering contract, when the facts justify the conclusion that it is a mere speculation on human life with one having no insurable interest, and each case must be determined by the character of the particular transaction. And under the peculiar facts of that case it did not possess the elements of a wagering contract, but the very reverse.

In the case of *Insurance Company v. Allen*, 138 Mass., 564 (52 mer. Rep., 250).

The policy in this case was taken out by the wife on the life of her husband, payable to her if living, if not to her children. It was transferred by her to Allen, the consideration for the assignment being a certain sum paid and the discharge of certain notes held by Allen against her husband. It is stated in the opinion:

"It is to be assumed from the report that the transaction was not in the intent of the parties a wagering contract, but an honest and a *bona fide* sale of the equitable interest in the policy. The defendant, Allen, had no insurable interest in the life of Mr. Fellows except as a creditor, and that interest ceased when he ceased to be a creditor by accepting a transfer of the policy in satisfaction of his policy, so that he is in the position of a *bona fide* assignee of the policy for a valuable consideration without interest in the life of the insured."

It is manifest, as we insist, that this case only decides that the assignment of a policy to one having no insurable interest "is neither conclusive or even *prima* evidence that the transaction is *prima facie* evidence that the transaction is illegal."

The opinion concludes with this statement:

"We think the second ruling is correct, and that the fact that the assignee had no insurable interest in the life does not avoid the assignment. It is one circumstance to be regarded in determining the character of the transaction, but is not conclusive of its illegality."

In that case the important fact is shown that Allen was a creditor of Fellows, and might as such have taken out a policy in his own name, and it was the discharge of the notes due to him that constituted a part of the consideration for the assignment.

But apart from this the opinion is predicated upon two propositions, one that a life policy is the subject of assignment, as any other contract, and that the wagering element of a speculative contract based on human life is not a matter of sufficient moment to control or effect the assignment, and the other is that it is not necessary that the interest should continue if once existent to the death of the one whose life is insured.

As to the validity and effect of the policy itself this proposition has never been disputed by us, so far as the Insurance Company itself is concerned.

There are other cases cited by the opposing counsel similar in principle to the two just referred to which were determined upon the inherent equity of the assignee's claim, and in which there was no element of fraud, or a wagering contract, and a number of the cases cited were suits directly against the insurance company, without intervention on the part of any representative of the assured. Such a decision could not be determinative of the question as to who was entitled to the excess over the amount necessary to reimburse the assignee, he being clearly entitled to that much.

But there are quite a number of the cases cited which do squarely raise the issue presented here, and in which it is held that the holder of a policy lawfully taken out in his own name may transfer it as he would any other chose in action, with the world for a market.

It is the principle and reasoning upon which these cases are decided that we challenge, and propose to show that they are at variance with the established decisions of this Court. We shall only call attention to a few, but they are characteristic of all.

In the case of *Clark v. Allen*, 11 R. I., 439, 23 Amer. Rep., among other reasons why the assignment should be sustained, it is said:

“But finally it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and this, the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate which exposes the purchaser to a similar temptation. It has been decided, too, that a policy effected by a creditor on the life of his debtor does not expire when the debt is paid, though the holder then ceases to be interested in the continuance of the life and is therefore exposed to the same temptation which is supposed to beset the assignee, with an interest to bring it to an end. . . . If the danger is not sufficient to avoid the policy when the interest ceases, why should it be sufficient to avoid the assignment to an assignee without interest.”

But this Court held in the case of *Crotty v. Insurance Co.*, 144 U. S., 621:

“It is the settled law of this Court that a claimant under a life insurance policy must have an insurable

interest in the life of the deceased, wagering contracts in insurance have been repeatedly denounced.”

“If a policy of insurance be taken out by a debtor on his own life naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein and the policy becomes one for the benefit of the insured and collectable by his representatives.”

In *Ins. Co. v. Schaeffer*, 94 U. S., 457, it was said:

“In cases where insurance is effected merely by way of indemnity, as when a creditor insures the life of a debtor for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.”

The other reason assigned in the case cited of *Clark v. Allen* is that the same temptation to take life arises in the case of a purchase of a remainder interest, when the temptation of the remaindermen to take the life of the tenant is as great as in the case of the purchase of an insurance policy.

This is a stock argument made in all these cases, but there is no analogy between the two cases, for the reason that the first holder of the life policy must necessarily have had an insurable interest, otherwise the policy could not be lawfully issued, and when he transfers to one having no insurable interest, the relation of the person to the holder of the policy is materially changed, and for the

first time does his life become exposed to the temptation of another to destroy it. Whereas the holder of a remainder interest who proposes to sell it is already exposed to the same temptation, and by the sale of the interest there has been no increased danger to the life of the life tenant. Moreover, a remainder interest is sold for a certain specified sum, which does not depend upon the length of the life of the life tenant, and which must be paid in all events. Moreover, there is a possibility of merging the two estates by purchase from the life tenant or a sale to him. In a policy of life insurance, on the other hand, there is no possibility of present enjoyment.

In the case of *Chamberlain v. Butler*, 61 Neb., 730; 87 Am. St. Rep., 478, 482, it is said:

"The principal reason for branding assignments of this nature as inimical to sound public policy is that the interest of a stranger in the death of the insured is so strong as to tempt to murder of the latter, the earlier to participate in the avails of the policy. Such interest doubtless tends to such a desire." "But the same desire would doubtless exist on the part of a creditor who has an insurable interest, or of one who advanced money on the policy when his only hope of reimbursing himself for the loan might be the policy."

Then follows this most remarkable statement:

"It is exceedingly doubtful if strangers are any more apt to either desire or seek to accomplish the

death of others than are those more nearly related to them. The strength of this desire, where it exists, depends not so much upon consanguinity of the parties as upon the moral stamina of him who holds the expectancy."

The learned Judge places an exceedingly low estimate upon the ties of human affections that bind the members of a family to each other, and one at variance with the experience and the common knowledge of all. And the same argument if applied to the original issuance of the policy would wipe away all restrictions that it must be issued directly to the insured or one having an insurance interest.

In the case of *Insurance Co. v. Schaefer*, 94 U. S., *supra*, this reasoning of the learned Nebraska Judge is thus answered:

"The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously to protect the life of the assured than any other consideration."

It might be inferred from the brief of opposing counsel filed in support of the petition for certiorari in this case on page 40, that the learned Annotator, Judge Freeman, in his elaborate note to the case just cited by him, 87 Amer. St. Rep., 507, approved the position taken by that Court, but such is not the case, for on page 509 in next to last paragraph he says:

“The view of those cases holding an insurable interest in the assignee (necessary) seems preferable. It must be admitted, however, that the other is supported by the preponderance of authority, and seems to be more in line with the tendency of later decisions.”

The word necessary was added by us make the sentence complete, the learned author had just been giving at full length the holdings of the Courts in the different states.

Another case cited by counsel is that of *Murphy v. Red*, 64 Miss. 614, 60 Amer. Rep. 68 in which the reasons given for the opinion are that the temptation to take life on the part of the assignee is not sufficient to make a contract of assignment invalid, and that,

“Other interests and conditions generally prevalent and involving tendencies quite as fatal to human life may be created and are maintained without any such restrictions.”

Illustrating by a remainderman, a legatee having knowledge of a provision by will, and as a further reason it is said,

“An insurable interest in the insured at the time the policy is issued is essential to the validity of the policy, but it has often been decided, as where a creditor takes out a policy on the life of a debtor that it is not necessary to the continuance of the insurance that the interest in the insured life should continue,

cessation of interest by the payment of the debt would not terminate the policy. If the danger to life is not sufficient to avoid the policy in such cases when the interest in the life ceases it is not preceived why it should be deemed sufficient to invalidate a contract by which a policy is sold and assigned to one without interest."

The learned Judge was correct in saying that the payment of the debt would not terminate the policy for it would still exist for the benefit of the debtor, but it would terminate the interest of the creditor and he would no longer have any interest in the early death of the insured, for he could not profit thereby.

The case of *A. O. U. W. v. Brown* 112 Ga. 545, is also cited by counsel, where in the Court in discussing the effect upon a contract of assignment, of a provision requiring the assignee to pay the premium thereafter to accrue on the policy, says,

"Indeed the temptation to hasten the death of the assured might be stronger when the assessments were to be paid by him (that is the insured) than where they were to be paid by the beneficiary, for the reason that the beneficiary could not be certain that the assured would continue to pay the assessment."

It is difficult to see why the beneficiary could not inform himself and provide against a lapse by the assured quite as easy as he could pay them all.

But in the case of *Ins. Co. v. Walton* 109 Ga., decided by the same Court, the fact that the insured kept up the premiums and the beneficiary was not obligated to do so, was stated as one of the reasons why the assignment was not a wagering contract, the *Walton case* being one in which the beneficiary was a mere appointee without consideration.

We might add with regard to the opinion of the Court in the case just cited *Ins. Co. v. Brown*, as well as the case of *Ins. Co. v. Walton*, 109 Ga., I, and *Rylander v. Allen* 125 Ga. 106, 6 L. R. A. (New Series) 128, that all of these cases are based upon a statute in that State, Code Sec. 2116 as follows:

“The assured may direct the money to be paid to his personal representative or widow, or to his children, or to his assignee and upon such direction given and assented to no other person can defeat the same but the assignment is good without such assent.”

We have thus called attention to most of the cases specially commented on by the opposing counsel. And we may safely assume that they present the strongest and most forcible reasons for his contention out of the many cases cited.

We do not agree that the text writers have endorsed the opinion of the “majority rule” as it is termed, those we have examined have been content to state the opinions of the various courts without giving their own views and without any attempt to harmonize the conflicting opinions.

The work of Mr. Vance we have not seen, the quotation from Mr. May in the brief when read with it is proper connections will be seen to have no bearing on the question under discussion. Indeed this author in Sec. 398 supports our contention, and so does Mr. Joyce, in our opinion, when fully read and understood.

In all the cases we have examined sustaining the contention of the plaintiff in addition to those cited, one of the fundamental grounds upon which the opinions are based is that the danger to human life as a ground of public policy for holding such contracts void, is fanciful, and of no moment. It is not claimed that the temptation to take life would be any less if the person took the policy by assignment, than there would be if the policy were issued to or assigned to him contemporaneously with its issuance, for such a contention could not truthfully be made. But to say that the risk to human life is not greatly enhanced by such a relation as that sustained by the assignee who has no insurable interest is in the teeth of and contrary to the very foundation of the doctrine which prohibits the issuance of the policy to one having no insurable interest. And in view of all that has been said from time to time by this Court, we believe that this reason can have no force with this Court.

The only real question, and the only one which we believe can appeal in the slightest degree to this Court is the one that in view of vast extent of life insurance business,

the reasons which have been held to apply against the issuance of a policy in the first instance should not be held to apply against its assignment after having been validly issued.

It is said that it is property, a valid chose in action, and its disposition should be as free and unrestrained as any other chose in action.

The claim of the supporters of this rule and in fact one of the learned Courts so stated the law, that it should be in the power of the insured to place the policy on the markets of the world. This means that its negotiation should be unrestricted, that it should pass from hand to hand without limit, that the insured when he had once parted with it, could never recall it, nor select the person who might hold it, that it might come into the possession of the vicious or the unfriendly over his protest. Is this a condition to be desired? Who can estimate the evil results of such a rule, if established.

But a life insurance policy is different from any other chose in action, in that its benefits can only be realized upon the death of the insured, and is made to depend upon a contingency which the holder, though feloniously, may contrive to bring about.

The encouragement which the courts have always given to the taking out of life policies has been that they are regarded in the nature of indemnities to the families and

those dependent on the insured, and are an encouragement to thrift and industry. The reason why the benefits of the insurance were extended to creditors, was that they too had an interest in his continued life, and credit would be more readily extended if they could be assured of their debt in the event of his death.

Now is it not true that to give to life insurance policies the qualities of negotiable paper, that the very purpose which brought such contracts into existence, or which allowed them to exist, is defeated and a life insurance policy means nothing more than any other contract. And the statutes of the various States making this a sacred fund for the widow and children should be repealed.

But of what profit has it been to the insured in those States wherein right to make the assignment has been upheld, from the reported cases the amount paid, has been a mere bagatelle. In the case of *Chamberlain vs. Butler, supra*, the policy was for \$5,000,000, and the amount paid the insured was \$75.00, and this assignment was allowed to stand as against his widow. In the case of *Clark v. Allen, supra*, the policy was for \$2,000.00, its surrender value was \$118.00, but the assignee paid \$125.00; in other words, just \$7.00 more than he could have taken the policy and cashed it out. And this was sustained as against the motherless children of the insured. In the case at bar the insured received \$100.00 and Plaintiff Grigsby made two payments of premiums on a \$10,000.00 policy.

The law is almost universal which protects the policyholder from loss in case he is unable to continue his insurance by returning to him the unearned increment, or as it is termed the cash surrender value, and the longer a policy has been kept in force and the more payments made upon it, the greater his reserved value. This provision of the law has been superinduced by the peculiar character of these contracts, and as an encouragement to this form of security.

Judge Sanborn who delivered the opinion in the case of *Gordon v. Ware*, 132 Fed. 444, said:

"This is a great commercial nation. The policy of the nation, the business habits and acts of its citizens and the tendency of the decisions of its Courts are to depart more and more from the older rules that chosed in action are not assignable to make them more and more the subjects of traffic and of commerce, and to sustain their transfer in the ordinary course of business."

We set over against this view the opinion of the learned Judge who delivered the opinion in the Court of Appeals on this case:

"The fields of finance and commerce are sufficiently broad without extension in the direction of the negotiability of contracts which have their origin in the wholesome desire to provide for the contingencies of life. The hazards of business and the support of those survivors dependent upon the assured. Their use as

a collateral to secure an actual advance made at the time and the payment of premiums necessary to carry the contract, is recognized by the Courts, which regard sound public policy as opposed to mere speculative bargains based upon the chances of the continuance of human life."

One rule, that contended for by the plaintiff allows the contract to be set afloat on the sea of commerce, the other keeps it under the control of the assured and allows it to be used only as a security for sums advanced, thus taking away the temptation to evil, and holding out to the assured the possibility and hope of redeeming his contract.

I shall not undertake to set out the text or reasoning of the Courts which holds that a policy can not be assigned to one having no insurable interest, I shall be content to refer the Court to the cases. They are abstracted in the elaborate note of Judge Fremean to the case of *Chamberlain v. Butler*, 87 Amer. St. Rep., pages 508, 509, and also in the full note in 3 L. R. A. (N. S.) 953, 954. Which contains an exhaustive memoranda of all the authorities on both sides of this question. We cite the following cases:

Ala. Gold Ins. Co. v. Mobile Ins. Co., 81 Ala., 321 (1 So. Rep., 561).

Helmetag v. Miller, 76 Ala., 183, 52 Amer. St. Rep. 316.

Missouri Valley Ins. Co. v. Sturges, 18 Kans., 93, 26 Am. Rep., 761.

Mo. Valley Ins. Co. v. McCuen, 36 Kan., 146, 59 Am. Rep., 146.

- Basye v. Adams*, 81 Ky., 308.
Beard v. Sharp, 100 Ky., 606, 58 S. W., 1057.
Brumly v. Ins. Co., 92 S. W., 17.
Huesner v. Ins. Co., 47 Mo. App., 336.
Ins. Co. v. Richards, 99 Mo. App., 88, 72 S. W., 487.
Downey v. Hoffer, 110 Pa., 109, 20 Atl., 655.
Ins. Co. v. Norris, 115 Pa., 446, 2 Am. St. Rep., 572.
Gilbert v. Moose, 104 Pa., 74, 49 Am. Rep., 370.
Hoffman v. Hoke, 122 Pa., 377, 1. L. R. A., 229.
Price v. Ins. Co., 68 Tex., 4 S. W., 633.
Ins. Co. v. Hazlewood, 75 Tex., 338, 7 L. R. A., 307.
Wilton v. Ins. Co., 34 Tex., Civ. App., 156.
Tate v. Ins. Co., 97 Va., 74, 45 L. R. A., 243.
Roller v. Moore, 86 Va., 512, 6 L. R. A., 136.

It only remains to apply the principles of these cases to the case at bar.

It is clearly inferable from the stipulations of fact and the letters of insured to the Plaintiff Grigsby, that Bur-
chard went to the hospital to submit to a dangerous opera-
tion with the knowledge, if not under the advice of Grigsby,
who it appears is a doctor; that the money which was paid
as a consideration for the assignment was to be used and
was used for that specific purpose of having the operation
performed, and this was the cause for the loan; that Bur-

chards life at the time was in a most precarious situation, as a result of a fall into the fire received in a fainting spell, burning his skull and destroying its vitality, and rendering necessary the removal of a portion of the upper table of the skull. (Tr., page 21.) That it required weeks of treatment before the operation could be performed.

What might be issue of this operation was one of doubt and anxiety as expressed by the assured to his doctor friend Grigsby. That the plaintiff was fully apprised of this condition when he made the trade and took the assignment there can not be a doubt, that he availed himself of this distressing condition to drive a bargain with his friend, if not patient, is beyond doubt. That a person under such conditions and occupying such a relation to the insured should be permitted to acquire and hold such an unreasonable advantage is monstrous. Had Burchard been in sound condition the price paid was low enough, but in the condition of his health at the time, the price paid was so low as to shock the conscience of the Court. Unless it be held, as was done in the case of *Page v. Bernstine* in 102 U. S., *supra*, where the Court held that the assignment of the policy was intended merely as a security for the debt, notwithstanding it appeared to be absolute on its face, in order to escape the conclusion that it was a wagering contract.

In none of the cases cited by plaintiff's counsel has there been a case in which the facts attending the purchase have been of such a character as those attending the transfer in this case.

That it was a wagering contract pure and simple there can be no question.

The standard for determining whether a contract for a life insurance policy is a wagering contract as expressed by Chief Justice Shaw in the case of *Loomis v. Ins. Co.* 6 Gray (Mass.) 399, and approved by Justice Bradley in the case of *Ins. Co. v. Schaefer*, *supra*, it is said:

“That the insured has some interest in the *cestui-que vie*, that his temporal affairs, his hopes, and well grounded expectations of support, of patronage, and advantage in life will be impaired (by the death of the death of the insured) so that the real purpose is not a wager but to secure such advantages supposed to depend on the life of another.”

None of these things existed in the mind of Grigsby, nor was the purchase made to secure such advantages, or to reimburse him for the possible loss by the death of the insured, it was made for the hope of gain.

We will apply to the facts of this case the reasoning of the Court in the case of *Ins. Co. v. Sturges*, 18 Kan., 93, 26 Amer. Rep., 761, simply using the names of the parties here instead of the names in that case, and changing the amounts:

“Grigsby never had any interest in the life of Burchard, but on the contrary his whole interest, after said assignment was in the death of Burchard. Each

year that Burchard lived Grigsby was compelled to pay \$225.00 without the slightest hope of ever receiving anything in return therefor. He was compelled to pay that amount in order to preserve the life insurance policy, but no payment that he could make would increase the amount of, the benefit he expected finally receive. The policy in case of death was worth just as much the day of the assignment as it could ever be afterwards. If Burchard had died on the day of the assignment, the holder of the policy would have been entitled to receive \$10,000.00, and no payment for any length of time thereafter could ever increase that amount, nor was Burchard bound to ever refund anything to Grigsby, and nothing that Burchard might ever own, or receive could ever possibly go to Grigsby. Grigsby was not dependent on Burchard for support, nor was he his heir or devisee or legatee, nor was there the slightest tie of kinship or relationship, binding them together."

(We omitted in the last sentence the word friendship after the word relationship, because it is no doubt true that Burchard believed Grigsby to be his friend though his conduct in this case shows him not to have been a friend in fact.) The Court adds:

"Hence it will be perceived that Grigsby after said assignment, had a vast interest in procuring the death of Burchard, but had no interest whatever in preserving his life. Burchard's life cost Grigsby \$225.00 a year without the slightest benefit in return, while Burchard's death would be worth \$10,000.00 to

Grigsby without the slightest loss or inconvenience. Now can such a state of things be tolerated by the laws of any civilized country?"

The Court further said:

"And of all wagering contracts those concerning human life should receive the strongest, the most emphatic, and the most persistent condemnation. This is just what the present insurance policy was in the hands of Grigsby, a mere wagering contract upon the life of Burchard. And if the assignment to Grigsby were to be upheld, as valid under the law, it would virtually be saying that the law authorizes mere wagering speculations, mere mercenary traffic, concerning human life, and it would be opening the door wide and inviting to enter the most shocking of all human crimes."

We respectfully insist that there was no error in the judgment of the Court of Appeals, and that the assignments of error should be overruled and the judgment of that Court affirmed.

Respectfully submitted,

GEO. T. HUGHES,

Solicitor for Defendants in Error.

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IN THE
Supreme Court of the United States

A. H. Grigsby,
Petitioner,

vs.

R. L. Russell and Lillie Burchard,
Administrators,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

*To The Honorable, the Judges of the Supreme Court of
the United States:*

Petitioner, A. H. Grigsby, respectfully petitions this Honorable Court that the writ of certiorari may be granted directing the Circuit Court of Appeals of the Sixth Circuit to certify to this Honorable Court, for its review and determination, the case therein decided, wherein respondents Russell and Burchard, Administrators, were plaintiffs in error, and petitioner, A. H. Grigsby was defendant in error; and as reasons for this application petitioner respectfully shows the following:

STATEMENT OF CASE.

This litigation was begun by a bill of interpleader filed January 29th, 1907, by the Penn Mutual Life Insurance Company, a corporation of Pennsylvania, against this petitioner and these respondents, all being citizens of Tennessee, in the Circuit Court of the United States for the Middle District of Tennessee. (Trans., pp. 1-3.)

The Penn Mutual Life Insurance Company, on January 26th, 1903, issued a policy of life insurance for ten thousand dollars to John C. Burchard, of Tennessee, on his life, payable to the "Executors, Administrators or Assigns" of the insured. (Trans., pp. 31-39.)

In February, 1905, the insured for a cash consideration, sold, and by an absolute assignment in writing, transferred to petitioner said policy of insurance, with all of his legal rights, benefits and interests therein. (Trans., p. 30.)

After the death of the insured, which occurred on December 13th, 1906, the said insurance company paid the amount of said policy into Court, under its said bill of interpleader; petitioner as the assignee of said policy, and the respondents as the administrators of the insured, impleaded; and the only question presented below was, whether the proceeds of said policy should be paid to petitioner or to the said administrators of the deceased.

The assignment of said policy by the insured to petitioner occurred under the following circumstances: After the insured had carried the policy two years, and had paid two annual premiums, the third annual premium fell due on January 23, 1905; the insured had, in the meantime, met with financial misfortunes and was unable to meet this premium; he had also incurred a serious injury which necessitated a surgical operation, and was without means to obtain the treatment he needed; the policy had no cash surrender value, and was about to be forfeited for non-payment of this premium. At this critical juncture, the insured sought petitioner, who was his friend, and asked him to buy said policy for one hundred dollars and take an absolute assignment of it, and after ascertaining that the third annual premium, which was then past due by the terms of the policy, would be received by the company, and that upon its payment the policy would be continued in force, petitioner paid said premium to the company, paid the insured one hundred dollars, took an absolute assignment of the policy and assumed responsibility for future premiums. Petitioner at once sent the insurance company a copy of this assignment, and thereafter paid out of his own funds, and on his own account, two annual premiums, which the insurance company received from petitioner as the assignee of said policy.

The injured did not die from the effects of the injury or surgical operation above mentioned. He used the one hundred dollars, for which he sold the policy

to petitioner, in obtaining surgical relief for his injury aforesaid, and was relieved and cured of that injury. The insured was in no way related to petitioner.

After the death of the insured, petitioner, as assignee of said policy, made formal proofs of death to the insurance company. The policy contained a provision that "Any claim against the company made under any assignment of this policy shall be subject to proof of interest." The insurance company, being satisfied with the proof of interest in the assignee, and the proof of the death of the insured, was preparing and intending to pay the amount of the policy to petitioner, as assignee thereof, when it received notice that the administrators of the insured would contest the validity of the assignment. The insurance company thereupon filed its bill of interpleader before mentioned.

There is no contention or suggestion of collusion or bad faith upon the part of the insured or the assignee with respect to the issuance of the policy, or the making of the subsequent assignment. There is no controverted question of fact in the case. The facts are contained in a stipulation duly signed by counsel for both parties. (Trans., pp. 28-43.)

The single, sharp question of law presented in the Court below was, whether or not the insured, who had, in good faith, taken out the policy upon his own life, payable to his estate, and who had carried it in good

faith until, overtaken by misfortune, he became unable to longer pay the premiums on it, could make a valid sale of it for value to petitioner, the insurance company assenting and receiving subsequent premiums from petitioner, and all parties acting in perfect good faith.

Two learned Judges, in the Circuit Court below, one upon a hearing on demurrer and the other upon final hearing, held that the assignment of said policy to petitioner was a valid assignment, and that petitioner was entitled, as such assignee, to its proceeds, and it was by that Court so ordered and decreed. (Trans., pp. 27, 28; 43-45.)

Respondents thereupon carried the case before the Circuit Court of Appeals of the Sixth District, for review; and that Court delivered an opinion, and entered a decree, reversing the decision of the Circuit Court, and held that said assignment to petitioner was a wager contract and void because contrary to public policy, and that respondents, as the administrators of the insured, and not petitioner, were entitled to the proceeds of said insurance. (Trans., pp. 53, 54-68.)

GROUND FOR ISSUANCE OF CERTIORARI.

Upon the above facts and the record in the case, petitioner states the following grounds and reasons for the issuance of the writ of certiorari to bring before this Honorable Court for review and reversal the said

erroneous holding and decree of the said Circuit Court of Appeals:

I.

The Circuit Court of Appeals erred in holding that the sale and assignment of this policy of insurance by the insured to petitioner, under the circumstances revealed by this record, was void.

The case presented is not that of an assignment made to one without insurable interest in pursuance of a collusive understanding between the insured and the assignee, by the terms of which the policy is obtained in the first instance for the purpose of being so assigned, and thus cloaking and covering up, by a collusive assignment, the unlawful issuance of a wager policy to one having no insurable interest in the life insured. In such a case, the assignment would, of course, be void.

The insured in this case admittedly took out the policy in good faith, upon his own life, payable to his estate, and paid the premiums as long as he was financially able to do so. He, of course, had an insurable interest in his own life, and it is conceded that the policy was issued in good faith, and was a valid and binding policy.

This being true, petitioner is advised that the rule of law against the issuance of a wager policy to one having no insurable interest in the life insured was, for all time, complied with and satisfied; and that the

Circuit Court of Appeals should have held that the subsequent sale and assignment of said policy, in good faith, by the insured to petitioner, with the knowledge and consent of the insurance company, was a valid exercise of the contract and property right which the insured possessed as the holder and owner thereof.

II.

Conflicting decisions of the United States Circuit Courts of Appeals, with respect to this important and far-reaching question.

The question of the assignability of life insurance to one without insurable interest in the life insured, but who takes the policy in good faith and keeps it alive, with the knowledge and consent of the insurance company, is, of course, one of very great and vital importance to the whole country. No class of investments is more common than life insurance. Upon the final and authoritative decision of this question will depend an important element of value in every life insurance policy within the jurisdiction of the courts of the United States, to whomsoever it be made payable originally, and especially when it is made payable, on its face, to the "executors, administrators or assigns" of the policy holder.

While this Honorable Court has never passed upon the question of the validity of an assignment like the one involved here, its decisions have been cited by

judges and text-writers both as sustaining and as condemning such assignments; and the United States Circuit Courts of Appeals are in hopeless conflict on the question.

In *Gordon v. Ware National Bank*, 132 Fed. Rep., 444-450, the Circuit Court of Appeals of the Eighth Circuit, in an opinion delivered by Judge Sanborn, August 22, 1904, held such an assignment valid, and declared in favor of protecting both the right of the holder of the policy to sell and assign, and the right of a stranger to purchase and receive the proceeds of a policy under such circumstances; and the learned Judge cited the opinions and decisions of this Honorable Court as sustaining that view.

On the other hand, in *Alexander v. Lane*, 157 Fed. Rep., 1002, the Circuit Court of Appeals of the Fifth Circuit, in a memorandum decision rendered October 28, 1907, affirmed the decree of the Circuit Court for the Eastern District of Georgia, which had been pronounced in said case, styled in the Circuit Court, *Mutual Life Insurance Co. v. Lane*, 151 Fed. Rep., 276, adjudging such an assignment void. The opinion in the Circuit Court, by District Judge Speer (151 Fed. Rep., 276-290), holding that such an assignment of an insurance policy was an illegal and void contract and conferred no rights upon the assignee of the policy, was based very largely, if not chiefly, upon certain expressions in the opinions of this Honorable Court, which he construed as condemning such assignments.

In the case at bar, the Circuit Court of Appeals of the Sixth Circuit, speaking through Lurton, Circuit Judge, has followed the rule announced by District Judge Speer on the Circuit, and affirmed by the Circuit Court of Appeals of the Fifth Circuit, and has disapproved the contrary decision of the Circuit Court of Appeals of the Eighth Circuit.

Conflicting Views as to Attitude of Supreme Court.

Petitioner now shows that while this Honorable Court, as before stated, has never passed upon this question directly, it has, in deciding cases in which *collusive* assignments made in efforts to cloak the initial issuance of unlawful wager policies were held void, used certain expressions *arguendo*, or by way of dicta, which have by the different Circuit Courts of Appeals aforesaid, as well as by numerous other judges and text-writers, been held consistent with, and indeed as supporting, *diametrically opposite rulings* on this question, upon substantially the same facts.

A very large majority, in fact more than three-fourths, of the American States which have spoken through their Courts on this question, have held such assignments as the one involved here to be lawful and valid, and clearly distinguishable from assignments tainted with collusion effecting the inception of the insurance contract, and have thus established what is termed the "prevailing" or "majority" rule. And many of the Courts of last resort in the different States,

just as the United States Circuit Courts of Appeals, have cited the opinions of this Honorable Court as being consistent with, and as supporting, diametrically opposite views on the validity or invalidity of such assignments. And the learned text-writers of the country, upon the subject of life insurance, likewise disagree as to the result of the decisions, or opinions rather, of this Honorable Court on this question; and several of them, notably *Mr. Bacon*, *Mr. May*, *Mr. Vance* and *Mr. Joyce*, have classed the decisions of this Honorable Court as leaning towards the "majority rule," which the learned Court of Appeals in the case at bar refused and declined to follow.

In such a state of conflicting decisions pronounced by the United States Circuit Courts of Appeals, and in such a state of inextricable confusion in the authorities generally, upon this question, petitioner is advised that he has, under the practice and the rules announced in the decisions of this Honorable Court, the privilege of asking, in the interest of uniformity of precedent as well as in the interest of the correct decision of the case at bar, for the issuance of the writ of certiorari.

III.

The Circuit Court of Appeals erred in holding that any provision contained in the policy of insurance militated against the right of petitioner, as assignee, to receive the proceeds of the policy.

Although the learned Circuit Court of Appeals grounded its decision squarely on the proposition that

the assignment was void as against public policy because the assignee was without insurable interest in the life of the assignor, yet it referred to the provision now to be quoted as of influence upon the decision, and therefore it is briefly here noticed.

The only provision in the policy which the Circuit Court of Appeals mentioned as at all material to consider on the question of the validity of the assignment was the following:

"Any claim *against the company*, arising under any assignment of this policy, shall be subject to proof or interest." (Trans., pp. 32, 33; Opinion, Trans., pp. 66, 67.)

The Court declared, however, that if the assignment was not unlawful and invalid, because contrary to public policy, this clause of the policy would be "of little consequence in the case." (Opinion, Trans., p. 67.)

Petitioner is advised that the above quoted provision was placed in the policy solely for the protection of the company, and that it cannot be strained into a contract restriction against an assignment of the policy. By its very terms, it is merely a right reserved *to the insurance company* to require proof of interest when liability is asserted *against the company* by an assignee. Moreover, this provision, even as to claims against the company, does not require proof that the assignee has an "insurable interest" *in the life of the insured*; it obviously means *interest in the policy*, and

would be satisfied by the interest of petitioner as *absolute assignee for value*—if the assignment was valid under the law.

But it is clear, as petitioner is advised, that this provision was, at all events, placed in the policy solely for the protection of the insurance company, could be waived by it, and was waived by it, and became nugatory, when the company recognized the assignment, received premiums from the assignee, was preparing to pay the proceeds of the policy to him, and paid the amount of the policy into court, under its bill of interpleader, with an *expressed indifference* upon its part as to who should receive the fund.

Petitioner is advised that if the opinion of the learned Circuit Court of Appeals is to be understood as announcing a contrary holding in the case at bar, it is manifestly erroneous.

IV.

The Circuit Court of Appeals erred in holding that this contract of assignment, admittedly made in good faith, in the State of Tennessee, between the insured and petitioner, both citizens of Tennessee, was void upon any supposed ground of "public policy," when the previous holding of the highest Court in the State of Tennessee is to the contrary.

This contract of assignment was made in Tennessee, between two citizens of Tennessee, and performed in Tennessee. By the previous holding of the highest Court of Tennessee, this assignment was a valid and

lawful contract. It was *property* which the law of Tennessee, as announced by its Court of last resort, will recognize and protect. The right to collect the policy, by virtue of the executed contract of assignment, was a fully *vested right* in the assignee.

In such a case, as petitioner is advised, it was error for the Circuit Court of Appeals to fail to follow the holding of the highest Court of Tennessee as to the "public policy" of that State with respect to such a contract, and upon its own idea of "public policy" hold invalid this Tennessee contract, and destroy rights which had previously vested thereunder.

CONCLUSION.

Petitioner has no right of appeal or writ of error herein to this Honorable Court, because the jurisdiction of the Circuit Court depended entirely upon diverse citizenship. Petitioner presents herewith, as a part of this petition, a brief showing more fully his views and citing authorities upon the questions involved, and a complete transcript of the record in the said Circuit Court of Appeals.

Wherefore, in view of the premises, petitioner prays that this Honorable Court will grant its writ of certiorari, to be directed to the Circuit Court of Appeals of the Sixth Circuit, requiring that the record of said case in the said Court, and its decree, be certified to this Court, and that this Honorable Court will thereupon

proceed to correct the errors complained of, reverse the said decree, remand the said cause, and give to petitioner such other and further relief as the nature of the case may require and to the Honorable Court may seem proper in the premises.

A. H. GRIGSBY,
Petitioner.

By Jno. A. Pitts.
Attorney.

JNO. A. PITTS,
K. T. McCONNICO,
MONTAGUE S. ROSS,
Counsel.

STATE OF TENNESSEE, {
COUNTY OF DAVIDSON, { SS.

Jno. A. Pitts, being duly sworn, says that he is one of the counsel for A. H. Grigsby, the petitioner, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

JNO. A. PITTS.

Sworn to and subscribed before me by Jno. A. Pitts, this 19th day of April, A. D., 1909. My commission expires October 7, 1911.

C. R. COCKLE,
Notary Public, Davidson County, Tennessee.

(SEAL)

I hereby certify that I have examined the foregoing petition, and that in my opinion the petition is well founded as to matters of fact and as to matters of law, and that the cause identified thereby is one, and is such, that the prayer of the petition should be granted by this Honorable Court.

JNO. A. PITTS.

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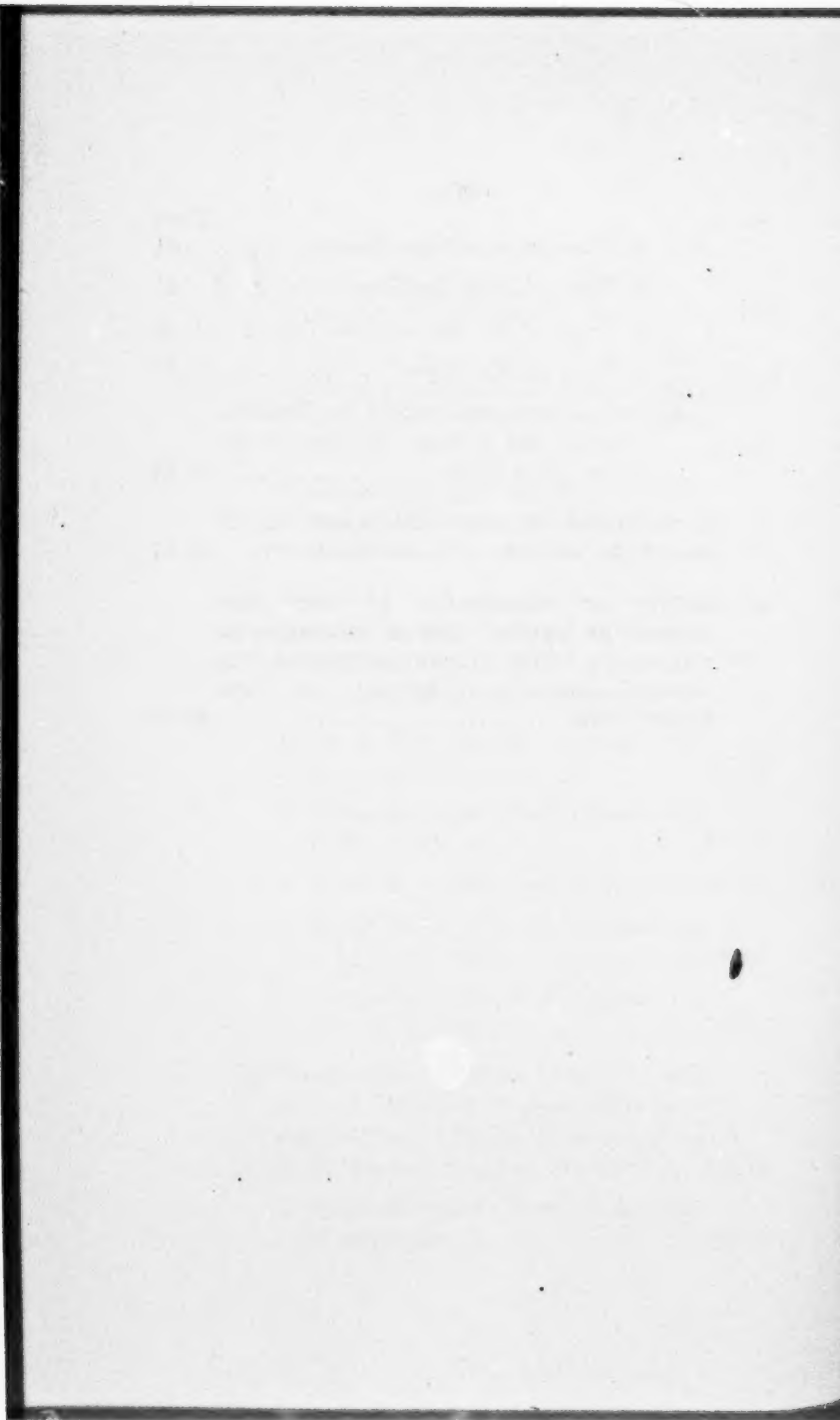
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IN THE
Supreme Court of the United States

A. H. Grigsby,
Petitioner,

vs.

R. L. Russell and Lillie Burchard,
Administrators of John C. Burchard, Deceased,
Respondents.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

I.

As revealed by the accompanying petition for the writ of certiorari, there is in this case sharply presented one important and far-reaching legal question, which will be made the first subject of discussion in this brief. This question is with respect to—

**THE ASSIGNABILITY OF A LIFE INSURANCE POLICY TO A
PERSON WITHOUT INSURABLE INTEREST.**

To state the question more exactly, it is whether or not a life insurance policy, taken out by the insured

in good faith, payable to his "Executors, Administrators or Assigns," can *afterwards*, in good faith, with the knowledge and consent of the insurer, be sold and assigned by the insured, for a valuable consideration, to one having no insurable interest in the life of the insured, but who pays a valuable consideration for the policy which he buys, and in good faith, with the knowledge of the company, pays the subsequent premiums until the policy matures by the death of the insured? Does the assignee who buys a policy under such circumstances, and takes an absolute assignment of the same from the insured, acquire a right to collect the proceeds of the policy upon the death of the insured?

As stated in the accompanying petition, this question is one which this Court, from our examination of its reported decisions, has never had occasion to pass upon; and, at the same time, is a question upon which the Circuit Courts of Appeals are in emphatic and irreconcilable conflict.

**CONFLICTING DECISIONS—SO-CALLED "MAJORITY" AND
"MINORITY" RULES.**

The conflicting decisions with respect to this question have given rise to what the text writers and decided cases term the "prevailing," or "majority" rule, and the "minority" rule. By the "majority" rule, such an assignment of life insurance is valid; while by the "minority" rule, such an assignment is held void.

As we understand the "minority rule," it is this: That any assignment of a life insurance policy to one who has no insurable interest in the life insured is void unless the assignor is to pay future premiums and thus himself control the continuance of the insurance; in other words, that such a person has not the *capacity* to receive such an assignment; that it is a gambling and wagering transaction, and against public policy as tending to the destruction of human life. And of course it means that a paid-up policy, on which no future premiums are to be paid, cannot be, under any circumstances, assigned to one having no insurable interest in the life insured. This rule makes no distinction between a policy taken out on the life of another *in the beginning* by one without insurable interest in that life, and an assignment of a valid subsisting policy taken out originally by or in favor of one having an insurable interest, to one who has it not; but puts both transactions in the same category.

The "majority," or prevailing rule, on the other hand, holds, equally with the minority rule, that a policy is void if taken out or procured by one in his own favor in the first instance on the life of another in which he has no insurable interest, or if the original issue of the policy be tainted with a corrupt or collusive agreement that it is to be assigned to one without insurable interest and is so assigned pursuant to such arrangement; but that if a policy be honestly and in good faith procured in the first instance in favor of one who *has* an insurable interest in the life insured, so that the policy

is a valid and lawful contract, it is the *property of the beneficiary*—a valid *chose in action*—and he may sell and dispose of it, as he may any other property or chose in action.

The exact line of demarkation between the two rules is illustrated by a *paid-up policy*, where nothing further is to be done to keep it alive until the death of the insured: By the one rule, such a policy is *not assignable* to one without insurable interest, while by the other it is *assignable* to any one.

Now, with this statement of the two rules, and the distinction between them, let us first see how emphatically contradictory and antagonistic are the holdings of the Circuit Courts of Appeals which have passed upon this question.

CONFLICT BETWEEN UNITED STATES CIRCUIT COURTS
OF APPEALS.

Rule in the Eighth Circuit.

The Circuit Court of Appeals of the Eighth Circuit has followed the so-called "majority" rule. Its holding to this effect is presented in the case of

GORDON V. WARE NATIONAL BANK, 132 Fed. Rep.,
444-450.

In this case, the Court, speaking through Judge Sanborn, held that the pledgee of a policy of life insurance has the right and power to sell the policy to the highest bidder for the purpose of realizing money to pay the

debt which it secures, and that both immediate and remote assignees, under such a sale, take a good title to the policy and to its proceeds, although they have no insurable interest in the life insured by the policy.

In the course of the opinion, after citing a number of cases holding the so-called "minority" rule, the learned Judge says:

"The rule adopted by these States greatly detracts from the value of life insurance policies, and restricts their commercial value; for, if their possible purchasers are limited to those who have insurable interests in the lives they insure, it is obvious that buyers will be few, and their commercial value, and the traffic in them, must be much less than if all men may become their lawful purchasers. In view of this fact, the Supreme Court of the United States, and the courts of the great commercial communities of this country—of New York, Ohio, Massachusetts, Illinois, Michigan, New Jersey, California, Minnesota, Connecticut, Louisiana, Rhode Island, Wisconsin, Nebraska, Tennessee, South Carolina, Mississippi, and Maryland—have repudiated the old doctrine of the Supreme Court of Indiana, and have adopted the more modern and rational rule that 'Any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy.' "

Then follows a long list of cases supporting this text, and the learned Judge continues:

"The provision of the bankrupt law of 1898 that an insurance policy held by a bankrupt shall pass

to his trustee as assets of his estate, unless he pays to the trustee the surrender value of the policy, demonstrates the fact that the National Congress deemed the rule adopted by the Supreme Court, and by the courts of these States, the established law of the nation. The courts of Indiana themselves, the courts in which the opposite rule seems to have taken its rise, have lately repudiated it, have followed the trend of the more modern decisions, have adopted the more liberal rule, and have declared that: 'When the person himself, in good faith, makes the contract, procures the insurance on his own life, and pays the premiums, it is immaterial whether the beneficiary designated by him, or the assignee of the policy, has any insurable interest in the life of the insured or not. This doctrine is settled by this Court, and is in accordance with the decided weight of the authority.' *Millner v. Bowman*, 119 Ind., 448; 5 L. R. A., 95.

This is a great commercial nation. The policy of the nation, the business habits and acts of its citizens, and the tendency of the decisions of its courts, are to depart more and more from the old rule that choses in action are not assignable, to make them more and more the subjects of traffic and of commerce, and to sustain their transfers in the ordinary course of business. The stronger reasons, the decided trend of the decisions of the courts, and the great weight of authority, concur to establish the rule that an insurable interest in the assignee of a policy of life insurance is not essential to the validity of the assignment, if the party to whom it was originally issued had such an interest, and the assignment is not made as a cover for the issue of a wager policy."

It will be seen that in the above opinion, the Court of Appeals of the Eighth Circuit has unqualifiedly endorsed the "majority" rule; and that the Supreme Court of the United States is classed as favoring this rule.

Rule in the Fifth Circuit.

The Circuit Court of Appeals for the Fifth Circuit has followed the so-called "minority" rule. Its holding to this effect is presented in the case of

ALEXANDER V. LANE ET AL., Mem. Decision, 157 Fed. Rep., 1002.

In this memorandum decision, it was stated by the Court that the decree of the Circuit Court in the case, styled, in the Court below, *Mutual Life Insurance Co. v. Lane*, 151 Fed. Rep., 276-290, was affirmed on the authority of *Warnock v. Davis*, 104 U. S., 775, and *Manhattan Life Insurance Co. v. Hennessey*, 99 Fed. Rep., 70; 39 C. C. A., 625. When we examine the holding of the Circuit Court (151 Fed Rep., 276), affirmed in this case by the Circuit Court of Appeals of the Fifth Circuit, we find that District Judge Speer, in a lengthy opinion reviewing the authorities generally, and the decisions of this Court, unqualifiedly decides that the so-called "minority" rule is the law; and the learned Judge takes the view that the expressions contained in the decisions of the Supreme Court of the United States favor what we have termed the "minority" rule, which declares against the validity of such

an assignment of life insurance, thus construing the opinions of this Honorable Court exactly opposite from the construction placed upon them by Judge Sanborn in the case from the Eighth Circuit above quoted.

And the uncertainty as to the rule to be applied with reference to such assignments of insurance, was noted in an expression used by the Circuit Court for the Eastern District of Pennsylvania, in the case of

CLARK V. EQUITABLE LIFE ASSURANCE SOCIETY, 143
Fed. Rep., 176.

In this case, after noting that by the decisions of the New York courts such an assignment would be valid, while by the decisions of the Pennsylvania courts such an assignment would be void, the Court said:

“What the rule in the Federal Courts is, may perhaps admit of question, etc.”

Rule in the Sixth Circuit.

In the case at bar, the Circuit Court of Appeals for the Sixth Circuit, follows the so-called “minority” rule, and holds such an assignment void. Judge Lurton, speaking for the Court of Appeals, stated the question involved in this case, and noted the divergence of authority with reference thereto, as follows:

“Coming, then, to the validity of an assignment of a policy of life insurance, applied for and carried in good faith by the assured, and transferred

as a matter of financial necessity to a person having no insurable interest in the life of the assured, we are compelled to confess that there is a hopeless division between the decisions of the courts which have directly passed upon the question. The view taken by perhaps a decided majority of the State courts is that in such circumstances an assignment should be upheld as serving to give a greater sale value to such instruments by widening the class of possible purchasers, and that public policy is best subserved by upholding the commercial character of such contracts when there has been no connection between the assignee and the inception of the contract of insurance. Among the opinions which upholds this view we may cite: *Mutual Ins. Co. v. Allen*, 138 Mass., 564; *Rylander v. Allen*, 125 Ga., 206, and *Olmstead v. Keyes*, 85 N. Y., 593.

Among the cases holding that such assignments to one having no insurable interest in the assured are contrary to public policy, may be cited: *Downy v. Hoffer*, 110 Pa. St., 109; *Helmetag's Admr. v. Miller*, 76 Ala., 183; *Life Ins. Co. v. Sturges*, 18 Kan., 93; *Franklin Ins. Co. v. Hazzard*, 41 Ind., 116, etc."

(Tr., p. 57.)

And then the learned Judge agrees with Judge Speer and the Court of Appeals of the Fifth Circuit, and differs with Judge Sanborn and the Court of Appeals of the Eighth Circuit, in the view he takes of the rule that is favored by the Supreme Court of the United States. With respect to this he says:

"The decisions by the Supreme Court of the United States, curiously enough, are cited by

learned counsel for both views of the question, and, what is still more odd, are cited in more than one opinion as authority for antagonistic conclusions. This is a misapprehension due to a casual examination, for there can be no doubt that the plain trend of opinion in that Court has been in the direction of requiring any claimant to the proceeds of a policy to show an interest in the life of the assured. In order of time, the cases in that Court are as follows: *Cammack v. Lewis*, 15 Wall., 643; *Conn. Mutual Ins. Co. v. Schaefer*, 94 U. S., 457; *Aetna Life Ins. Co. v. France*, 94 U. S., 561; *Warnock v. Davis*, 104 U. S., 775; *New York Mutual Ins. Co. v. Armstrong*, 117 U. S., 597; *Crotty v. Insurance Co.*, 144 U. S., 621."

(Tr., p. 58.)

It will be noticed that in the case at bar the learned Court of Appeals does not declare that this question has ever been directly passed upon by this Court, but only that the "trend of opinion" in this Court "has been in the direction of requiring any claimant to the proceeds of the policy to show an interest in the life of the assured."

So, we submit that in this case, the respective Courts of Appeals being in emphatic conflict upon this vital question and construing the opinions of this Honorable Court as favoring the antagonistic rulings which they have announced, a typical case is presented calling for the allowance of the writ of certiorari, to the end that there may be uniformity of precedent and decision in the Federal tribunals upon this important and far-reaching subject.

CONFLICTING VIEWS OF COURTS AND TEXT-WRITERS
WITH RESPECT TO THE "TREND" OF THE DECISIONS
OF THE SUPREME COURT OF THE UNITED STATES.

As above noted, the Circuit Courts of Appeals have completely and emphatically differed upon the "trend" of the decisions of this Court with respect to the assignability of life insurance to one who, for value and in good faith, takes the assignment but has no insurable interest in the life insured. And in the case at bar Circuit Judge Lurton announces that this "misapprehension" as to the trend of the decisions of the Supreme Court, is "due to a casual examination" of these decisions.

With all deference, we respectfully submit that this view of the learned Circuit Judge is erroneous. It is unquestionably true that many of the learned text writers of the country, and many of the learned judges of the courts of last resort in the several States, after the most careful analysis of the opinions of this Court in the light of the facts involved, have classed them as favoring the assignability of life insurance under the circumstances indicated; and the views expressed by these authorities, we submit, have not been after a "casual examination," as the learned Circuit Judge suggests, but have been deliberately expressed by these learned authorities, after most exact and careful analyses of such opinions and facts.

For the convenience of the Court, we give brief

statements of the facts and quotations from several of the cases and text writers, showing that this is true.

In *Clark v. Allen*, 11 R. I., 439; 23 Am. Rep., 496, the action was for money had and received by the widow of an insured against an assignee of the policy, the assignee having collected the money from the insurance company under the assignment. The policy had been taken out and carried for some time by the insured, when he sold and transferred it to the assignee for \$125, estimated to be about the surrender value of the policy at the time, the face of the policy being \$2,000, and the assignee having no insurable interest in his life. The assignee was to pay the subsequent premiums, and did pay five quarterly premiums of \$25 each, when the insured died. The opinion of the Court was delivered by Chief Justice Durfee, who, after stating that there was great conflict of decision upon the question involved, proceeds as follows:

"We think the assignment was valid. A life policy is a chose in action, a species of property, which the holder may, for perfectly good and innocent reasons, wish to dispose of. He should be allowed to do so unless the law clearly forbids it. It is said that such an assignment, if permitted, may be used to circumvent the law. That is true, if insurance without interest is unlawful; but it does not follow that such an assignment is not to be permitted at all, because if permitted it may be abused. Let the abuse, not the *bona fide* use, be condemned and defeated. It is not claimed that the parties to the assignment here in question

had any design to circumvent or evade the law. Perhaps *Cammack v. Lewis*, 15 Wall., 243, *supra*, may be a case of that kind. Again, the assignment is said to be a gambling transaction, a mere bet or wager upon the chances of human life. But the wager was made when the policy was effected, and has the sanction of the law. The assignment simply transfers the policy, as any other legal chose in action may be transferred, from the holder to a *bona fide* purchaser. It is true there is an element of chance and uncertainty in the transaction; but so there is when a man takes a transfer of an annuity or buys a life estate, or an estate in remainder after the life estate. There is in all these cases a speculation upon the chances of human life. But the transaction has never been held to be void on that account. But finally it is urged that the purchaser or assignee subjects himself to the temptation to shorten the life insured, and that this the policy of the law does not countenance. The law permits the purchase of an estate in remainder after a life estate, which exposes the purchaser to a similar temptation. It has been decided, too, that a policy effected by a creditor on the life of his debtor does not expire when the debt is paid, though the holder then ceases to be interested in the continuance of the life, and is thereafter exposed to the same temptation which is supposed to beset the assignee without interest, to bring it to an end. (Citing cases.)

“If the danger is not sufficient to avoid the policy when the interest ceases, why should it be sufficient to avoid the assignment to an assignee without interest? The truth is, it is one thing

to say a man may take insurance upon the life of another for no purpose except as a speculation or bet on his chance of living, and may repeat the act *ad libitum*, and quite another thing to say that he may purchase the policy, as a matter of business, after it has once been duly issued under the sanction of the law, and is, therefore, an existing chose in action or right of property, which its owner may have the best of reasons for wishing to dispose of. There is in such a purchase, in our opinion, no immorality, and no imminent peril to human life. We should have strong reasons before we hold that a man shall not dispose of his own. Courts of justice, while they uphold the great and universally recognized interests of society, ought, nevertheless, to be cautious about making their own notions of public policy the criterion of legality, lest under the semblance of declaring the law they in fact usurp the functions of legislation. *Hilton v. Eskerley*, 6 El. & B., 47, 64.

"We therefore decide that whatever the law of this State may be in regard to procuring insurance upon the life of another without any interest in the life insured, it does not forbid the sale and assignment of a valid policy which is already in existence, to an assignee without interest in the life insured, when the assignment is permitted, or not prohibited by the policy, and is made, not as a contrivance to circumvent the law, but as an honest and *bona fide* business transaction."

In *Chamberlain v. Butler* (Nebraska, May 22, 1901), 54 L. R. A., 338, the Supreme Court of Nebraska had before it the question of the assignment of

a life insurance policy made in good faith, and under the circumstances presented in the case at bar. The assignment was upheld in an opinion delivered by the Chief Justice of the Court, after a critical review of the authorities, and a careful analysis of the "trend of decision" in the Supreme Court of the United States. In the course of its opinion the Court said:

"We are aware that there is a sharp conflict of authorities in the several American courts relative to the validity of a sale of a life insurance policy by one having an insurable interest to one not having such interest. In all the States, perhaps, it is held against public policy for one not having an insurable interest to procure insurance upon the life of another, even though it be with the consent of such person. In some of the States it is held against public policy for one who has taken out insurance upon his own life to transfer it to one having no insurable interest. In some of the States such a transaction is prohibited by express legislative enactment. But the question to be decided here is, assuming that Chamberlain had no such interest in the life of Butler, could he legally buy the policy in question, such policy in its inception having been valid, and taken out in good faith by Butler with no intention or design on his part of assigning it subsequently to Chamberlain? Those courts which hold such transactions void, proceed on the ground of public policy. Originally, at common law, choses in action that were assignable were exceedingly few, but the tendency is now reversed and those not assignable are the exception rather than the rule. The modern policy being, then, as

above stated, the reason for a rule contrary to such tendency should be exceedingly strong before a Court, where the question is yet unsettled, should adopt a contrary rule in any given case. While public policy is a salutary thing, it has its limitations and dangers. Among them is the fact that it is an exceedingly indefinite term, has no lines of definite demarkation, and may readily lend its aid to a Court anxious to make a good case rather than a safe precedent. For that reason, before a case is decided upon that ground solely, courts should be very sure that the reasons for so doing are clear, strong, and admit of no doubt concerning their reasonableness or applicability. Now, the principal reason for branding assignments of this nature as inimical to sound public policy is that the interest of a stranger in the death of an assured is so strong as to tempt to murder of the latter, the earlier to participate in the avails of the policy. Such interest doubtless tends to such a desire. But the same desire would exist on the part of a creditor who has an insurable interest, or of one who advances money on the policy, where his only hope of reimbursing himself for the loan might be the policy. It is exceedingly doubtful if strangers are any more apt to either desire or seek to accomplish the death of others than are those nearly related to them. The strength of this desire, where it exists, depends not so much upon the consanguinity of the parties as upon the moral stamina of him who holds the expectancy, be that expectancy an insurance policy, a devise, a remainder, or other acquisition which may not be had until the death of another. Another reason sometimes assigned

for holding such assignments illegal is that an assignee having no insurable interest is in the position of one who, in the first instance, takes out a wager policy. But we think not. If an insurable interest exists in the beneficiary at the time the policy is issued, and it is taken out in good faith, the object and purpose of the rule against wager policies would seem to have been sufficiently attained, and there is no more reason to apply the rule to policies taken out in good faith and afterwards assigned in good faith than there would be were the assured to retain it in his own hands."

The learned Court then cites *Warnock v. Davis*, 104 U. S., 775, stating the facts of that case, and then continues:

"In the opinion Justice Field says: 'The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name.' Under the facts involved in that case the language was proper, for there was collusion between the insured and the party to be benefited by his death by a receipt of the amount above mentioned. But the language is not applicable to this case, for there was no agreement between Butler and Chamberlain at the time the policy was procured that the latter should participate in its avails. The transaction with him was wholly independent of and subsequent to the original one between Butler and the insurance company. If their agreement had existed prior to the issuance of the policy, or contemporaneous therewith, then the words quoted would be appli-

cable; otherwise not. That this is the meaning of the words is clear when we read *Aetna Life Ins. Co. v. France*, 94 U. S., 567, and *Conn. Mut. Life Ins. Co. v. Schaefer*, 94 U. S., 457. In the France case that Court lays down the rule applicable to the facts in this case, viz.: That any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy. The intention and good faith of the parties are the governing principles. In the Schaefer case, the Court held that a life insurance policy originally valid does not cease to be so upon the termination of the assured party's interest in the life insured. It was certainly not intended in the Warnock case to overrule or modify either of them. They are not in conflict with that case when the facts are remembered. The language of the Court in the Warnock case is unfortunately somewhat misleading in several instances, although the ultimate conclusion reached is right."

The opinion closes as follows:

"If such choses in action may be legally sold absolutely, it is plain that more can be realized from them in the day of need than if available only as security for loans. And until it shall be made to appear that in those jurisdictions where such policies are assignable absolutely, crimes committed by such assignees are more frequent than in those where assignments of the nature of the one here involved are illegal, we are of opinion that the reasons for holding such transactions void are insufficient. Chamberlain, then, being under the facts agreed on, the absolute owner of

the policy, had the right to transfer it to Crandall, and such act was not a conversion of the policy of insurance, for he was entitled to the whole of the proceeds thereof, free from all claims of the plaintiff or the estate of the deceased."

In *Bursinger v. Bank of Watertown*, 67 Wisc., 76; 58 Am. Rep., 848, the Supreme Court of Wisconsin said:

"There being no question but that the policy was originally obtained for the benefit of a person having an insurable interest in the life of the assured, the policy being upon the life of the assured himself, that the owner of such policy may thereafter lawfully assign the same to another person, with the assent of the insurance company, is sustained by the great weight of authority, and, as we think, by sound principles of law."

Numerous authorities are then cited, and the opinion continues:

"All the cases cited by the learned counsel, in the courts of the United States, were cases where it was evident the original policies were taken out for the benefit of the persons to whom they were immediately assigned, and who, in fact, paid the premiums on the policies from the beginning. Taking out the policies in the names of the assignors in those cases was clearly a cover for acquiring a wager policy on the life of the person in whom the person really insured had no insurable interest. . . . It is not an established rule of law that every contract is void

which gives the party to it a pecuniary interest in the death of the other party, or of a third person. If that were law, then every conveyance, will, or other instrument which conveyed to another an estate in reversion would be void, as the reversioner is certainly interested in the speedy demise of the person owning the life estate. There would seem to be no greater reason for holding void a sale or assignment of a life insurance policy which has been obtained in good faith by the holder to a third person, with an agreement on his part to pay future premiums and receive the insurance money on the death of the assured, than there would be for holding that a person who held a life estate in real property could not lease such estate for the term of his life to the reversionaries upon the payment of a stipulated annual rent to be paid to the party having the life estate. In that case, the party taking the life lease would have just as much interest in the speedy death of the holder of the life estate as the purchaser of an insurance policy upon which annual premiums are to become due has in the death of the assured.

“The mere fact that a person who becomes the purchaser of a life policy may thereby become interested in the speedy death of the person to whom the policy is issued, can be no legal ground for holding such purchase void. In all the decided cases where such assignments have been held void there has also existed the fact that the assignee or purchaser has taken the policy, not in good faith, paying the value thereof, but as a speculation upon the life of the party in whom he has no interest, and so the transaction has

been brought within the rule against wagering policies. Nor are we able to perceive why the holder of a valid policy should be prevented from realizing the value of the same to him, before his death, by a *bona fide* sale or assignment thereof. Such sale or assignment may, in fact, be absolutely necessary in order to get any benefit of his policy. The holder may have paid thousands of dollars in premiums through a long series of years, and a time may come when he becomes unable to pay the premiums becoming due, and he must either sell his interest in the policy or suffer it to lapse and lose all the premiums paid. Under such circumstances, can there be anything against public policy or the law which prevents the unfortunate holder of the policy from selling the same for the best price he can, and so get some benefit of his previous payments? We think not. The only reason for holding such sale illegal is because it gives the purchaser a pecuniary interest in the speedy death, and as we have seen above, that fact alone has never been held sufficient to render a contract void."

In *Ritler v. Smith* (Md.), 2 L. R. A., the Supreme Court of Maryland, in discussing the same subject, said (page 846):

"In some cases they (assignments to persons without insurable interest) have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be, doubted. It means that one not a relative, or connected by consanguin-

ity, or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty of such a crime.

"This doctrine carried to its logical result has a far-reaching effect. It strikes down every legacy to a stranger which may become known to the legatee, as is frequently the case, before the death of the testator. It makes void every similar limitation in remainder after the death of a life tenant. Every conveyance of property in consideration that the grantee shall support the grantor during his life falls under the same condemnation. Yet we know of no case in which a Court has declared such testamentary dispositions or conveyances to be void on this ground. Other instances in which the same result would follow from the application of this doctrine could be readily suggested, but we need not pursue the subject further."

The point is made in some of the decisions following the "minority" rule, and was made by His Honor, Judge Lurton, in the case at bar, that the fact that the assignee of a policy assumes, or is required to pay, the future accruing premiums in order to keep the policy alive, is an additional inducement to the assignee to desire the death of the insured, and is to be regarded as an important factor in holding such assignments of life insurance invalid. This contention is well answered by the Supreme Court of Georgia in *A. O. U. W. v. Brown*, 112 Ga., 545; 37 S. E., 890, where the

Court, in commenting upon the case of *Union Fraternal League v. Walton*, 109 Ga., 1, said:

"It is true that in that case the assessments were kept up by the assured, while in the case in hand the assessments becoming due after the benefit fund was made payable to Mrs. Brown were to be paid by her, the beneficiary. We are unable to see, however, why that difference should alter the principle underlying the conclusion reached by the majority of the Court in *Union Fraternal League v. Walton*. The public policy which prevents one person from insuring the life of another in whose life he has no insurable interest, is based upon the presumption that a temptation would be held out to the one taking out the policy to hasten, by improper means, the time when he should receive the amount named in the policy. Such temptation would be as strong, we think, in a case where the assured took out a policy upon his own life for the benefit of one having no interest therein, and was to keep up the premiums or assessments, as it would be where the premiums or assessments were to be paid by the beneficiary. Indeed, the temptation to hasten the death of the assured might be stronger where the assessments were to be paid by him than where they were to be paid by the beneficiary, for the reason that the beneficiary could not be certain that the assured would continue to pay the assessments."

In *Murphy v. Red*, 64 Miss., 614; 60 Am. Rep., 68, the Supreme Court of Mississippi, in upholding assignments of their kind under discussion, after citing cer-

tain cases holding the contrary doctrine, uses the following vigorous language:

"The weight of reason and authority, we think, is against this view. There is obvious difference between the two transactions. It is contrary to public policy for a person to insure the life in which he has no insurable interest, and to derive benefit or advantage therefrom. This is condemned as gaming or wagering on the chances of human life, and as such is prohibited by law. But it is lawful for one person to insure his own life and after he has done so the policy becomes his own, if payable as in this case, and there is no good reason why he may not sell or dispose of it as he may of any other chose in action, if the policy was valid in its inception.

"A man may have the best of reasons for wishing to dispose of the policy on his life. The exigencies of business, or absolute necessity, may require him to do so. He may have paid large sums in premiums, and afterwards become unable to pay any more, and if he is not allowed to sell or assign on the best terms he can make, the policy may be lapsed and lost. To impair the value and utility of his policy, or require him to lose it, on the ground that if he were to sell or assign it, the assignee or purchaser would have a motive to kill him, or that any sale or assignment he might be able to effect with one who had no insurable interest in his life would be tainted with the vice of gambling is, as matter of law, extremely fanciful and unsatisfactory.

"Other interests and conditions, generally prevalent, and involving tendencies quite as fatal to

human life, may be created and are maintained, without any such restriction. It seems that a life tenant would be in about as much danger from the remainderman, and a testator from a person having no interest in his life, for whom he had made provision by will, as the insured would be from the assignee or purchaser without interest of his life insurance policy. An insurable interest in the assured, at the time the policy is issued, is essential to the validity of the policy, but it has often been decided, as where a creditor takes out a policy on the life of his debtor, that it is not necessary to the continuance of the insurance that the interest in the life insured should continue. Cessation of interest by payment of the debt in the case supposed, would not terminate the policy. (Citing cases.)

"If the danger to life is not adequate to avoid the policy in such cases when the interest in the life ceases, it is not perceived why it should be deemed sufficient to invalidate a contract by which a policy is sold and assigned to one without interest. Besides, the protection should not be overlooked which is afforded to the life insured by the doctrine that one cannot recover insurance money payable on the death of a party whose life he has taken by felonious act. It would be a reproach to the law of the land if he were allowed to do so. He could not, in fact, do so, any more than he could recover insurance money on a building which he had wilfully set fire to and burned."

And the following text writers and annotators treat or cite the decisions of this Honorable Court as

favoring the "majority" rule, and in some instances refer to the decisions of the Federal Courts as not being uniform:

Bacon on Benefit Societies and Life Insurance (2 Ed.), sec. 302.

Joyce on Insurance, Vol. 2, sec. 914-919.

A. & E. Enc. Law (2 Ed.), Vol. 3, p. 1025.

Cyc. Law & Procedure, Vol. 25, p. 709.

May on Insurance (1891 Ed.), sec. 398a.

Vance on Insurance (1904), p. 140.

So it will appear, we submit, that many of the learned text writers and courts of last resort in the several States, agree with Judge Sanborn of the Court of Appeals of the Eighth Circuit, in construing the opinions and decisions of this Court as favoring the "majority" rule, which the Court of Appeals in the case at bar declined to follow.

The material point upon this application which we wish to specially stress and emphasize is, that there is this emphatic conflict with respect to the question presented in the case at bar, between the Courts of Appeals of the United States; and that the authorities, generally, differ upon the effect of the "trend of decision" with respect to this question in this Court.

POSITION OF THE SUPREME COURT OF THE UNITED STATES.

An examination of the reports of the cases decided by this Court, with respect to the question we are pre-

senting, demonstrates that this Court has never had occasion to pass *directly* thereon.

CAMMACK V. LEWIS, 15 Wall., 643.

(Decided in 1872.)

Appeal from the Supreme Court of the District of Columbia. Opinion by Mr. Justice Field.

In this case there was presented a contest between the widow of the insured and an assignee of the policy. The case did not present the question of an absolute assignment, but it was held by the Court below, and affirmed by the Supreme Court, that Cammack held the policy as a mere security for what Lewis owed him, and the decree was that he should pay over the balance after deducting that small sum. Besides, the case presented a fraudulent arrangement made at the inception of the insurance, which the insurance company might probably have relied upon to defeat the policy, but, as between the parties, it was held would only have entitled Cammack to retain his debt and advances. There is nothing in the case, as we read it, which commits the Court to the "minority" rule on the assignability of life insurance contracts, by which the assignment is held void though made in good faith by one who is the lawful owner of a policy payable to his "executors, administrators or assigns."

CONN. MUT. INS. CO. V. SCHAEFER, 94 U. S., 457.

(Decided in 1876.)

From U. S. Circuit Court, Southern District of Ohio. Opinion by Mr. Justice Bradley.

The facts were: A policy was obtained on the joint lives of husband and wife, payable to the survivor on the death of either; the husband and wife were subsequently divorced, *a vinculo*; they both afterwards married again, the husband another wife and the wife another husband; the wife retained the policy and *paid the subsequent premiums* until her first husband's death; she then sued the company on the policy, and the company defended on the ground of want of insurable interest in the plaintiff after the divorce and at the date of the death.

The plaintiff recovered. The Court, among other things not pertinent here, said:

"The essential thing is, that the policy shall be *obtained in good faith*, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. . . .

The policy in question might, in our opinion, be sustained as a joint insurance, without reference to any other interest, or to the question whether the cessation of interest avoids a policy good at its inception. We do not hesitate to say, however, *that a policy taken out in good faith, and valid at its inception, is not avoided by the cessation of the insurable interest, unless such be the necessary effect of the provisions of the policy*

itself. Of course, a colorable or merely temporary interest would present circumstances from which want of good faith and an intent to evade the rule might be inferred. And in cases where the insurance is effected merely by way of indemnity, as where a creditor insures the life of his debtor for the purpose of securing his debt, the amount of insurable interest is the amount of the debt.

But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms."

The italics are ours.

There was no question of assignment of the policy involved in the case, it is true; but, most manifestly, the *principle* which will sustain a policy *after the interest of the beneficiary in the life insured has wholly ceased*, will sustain an assignment of the same policy to one who has no such interest—and we shall see that the same learned Court has since cited this case as sustaining such an assignment of a policy lawful and valid at its inception.

AETNA LIFE INS. CO. V. FRANCE, 94 U. S., 561.

(Decided in 1876.)

From U. S. Circuit Court, Eastern District of Pennsylvania. Opinion by Mr. Justice Bradley.

The facts were: A policy in the sum of \$10,000 was issued upon the life of one Chew, payable to his married sister, Mrs. France, a lady of wealth not dependent upon her brother, a comparatively poor man earning his living as a shoemaker, for her support; upon the death of Chew, Mrs. France and her husband brought suit upon the policy; the company insisted the policy was void for want of insurable interest in the beneficiary. The plaintiffs recovered.

The Court construed the policy as one obtained by Chew for the benefit of his sister, and, there being some question as to whether the brother or the sister paid the premiums, held that it made no difference which paid them.

Among other things the Court said:

"As held by us in the case of the Connecticut Mutual Life Insurance Company v. Schaefer, supra, p. 457, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. The direction of payment in the policy itself is equivalent to such an assignment."

The italics are ours.

There was a request in the Court below for an instruction to the effect that if Mrs. France paid the

premiums, she must show an insurable interest beyond that of mere relationship, before she could recover, which was refused.

This was held without error, on two grounds: (1) because the policy and premium receipts showed it was the brother's contract and that he paid the premiums, and the company was estopped from denying this fact, and (2), because by reason of the relationship of the insured and beneficiary, it was wholly immaterial what arrangement they made between themselves for payment of premiums—that such relationship rebutted the idea that it was a wager policy, such as the law condemns. (See pp. 564-5 of opinion—too long to quote.)

The Court did not hold that the relationship of brother and sister, merely, constituted a sufficient "insurable interest" in the sister to sustain a policy taken out by her on her brother's life; but, treating the policy as the brother's contract, held that it made no difference if the sister did pay the premiums.

The case goes much further than any of the others we have cited in sustaining *the principle* on which we rely, namely, that one who honestly procures insurance upon his own life may make it payable to whomsoever he pleases or assign it to whomsoever he pleases. And, it will be observed, the Court cites the previous case of *Ins. Co. v. Schaefer*, decided at same term, as *establishing these very propositions*.

Both of the above opinions, in 94 U. S., are *unanimous* opinions of the Court, and it must be assumed that Mr. Justice Field, who delivered the opinion next to be examined, and which was commented on with so much emphasis by the learned Circuit Court of Appeals in the case at bar, concurred in them.

WARNOCK V. DAVIS, 104 U. S., 775.

(Decided in 1881.)

From U. S. Circuit Court, Southern District of Ohio.
Opinion by Mr. Justice Field.

The facts were: One Crosser, a resident of Kentucky, entered into an agreement with the Scioto Trust Association, a partnership firm, of Portsmouth, Ohio, whereby Crosser was to obtain a policy on his own life for \$5,000, payable to himself, and transfer nine-tenths thereof to the association in consideration of its paying all the premiums; the policy was accordingly obtained and immediately so assigned, and the premiums were paid according to the agreement; upon Crosser's death the association collected the policy and paid to Crosser's widow one-tenth of the proceeds, reserving nine-tenths; thereafter Warnock, administrator of Crosser, sued the association to recover this nine-tenths.

The case was tried below by the Court without a jury, and judgment was awarded for the defendants. This judgment was reversed by the Supreme Court, which gave plaintiff a recovery.

The case, as seen from its facts, was a typical one of fraudulent collusion at the inception of the insurance contract, which vitiated the assignment according to all the authorities—those holding to the “majority,” as well as those holding to the “minority” rule—and there is no sort of question that the *right result was reached* by the Supreme Court.

It is true that in the course of the opinion the Court said:

“The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name.”

And in the same opinion the Court used this language:

“But if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured, it is difficult to see why that reason is not a cogent and operative one against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which invalidates the one should invalidate the other, so far at least as to restrict the right of the assignee to the sums actually advanced by him,” etc.

And in this case, it is undoubtedly true that the Court used other expressions to the effect that there is no difference between a policy taken out originally by one without insurable interest and an assignment to one without such interest; and the learned Judge did,

apparently, if we look simply to what he said, and without bearing in mind the *facts* about which he was speaking, and which he evidently had in his mind, endorse the "minority" rule.

But his meaning has not been so interpreted by judges and text writers, nor, as we read the case, presently to be cited, has his meaning been so interpreted by the learned Judge himself.

And the important thing, upon this application for *certiorari*, is that different Circuit Courts of Appeals of the United States have differed with respect to the state and meaning of the decisions of this Honorable Court upon this question, and have announced contradictory results as deducible from them.

Some of the interpretations and analyses of the expressions contained in this opinion have been shown in the previous parts of this brief, and others will be cited at the conclusion of this review.

N. Y. MUT. L. INS. CO. V. ARMSTRONG, 117 U. S., 597.

(Decided in 1885.)

From U. S. Circuit Court, Eastern District of New York, Opinion by Mr. Justice Field.

In this case the insurance policy was issued upon the life of Armstrong and was assigned to Hunter by Armstrong before its actual issuance, and it was

claimed that Hunter was a special partner in business with Armstrong and thus had an insurable interest in Armstrong's life. Afterwards Hunter killed Armstrong, and was hung for the offense; and the widow of Armstrong, as his administratrix, brought suit against the insurance company to recover the amount of the policy.

The Court, while rejecting the idea, pressed in argument, that there had been no assignment to Hunter, considered the case in the two aspects, namely: (1) of a policy obtained originally by a fraudulent and collusive arrangement between the assured and a stranger without insurable interest—holding the whole policy in that view void; and (2) of a policy procured by one who had an insurable interest (for it was claimed Hunter was a special partner in business with Armstrong, and by virtue of this relation had an insurable interest in Armstrong's life), and without reference to any bad motive of Hunter at the time—holding in that view that the policy could not be collected because the life of the assured was feloniously taken by the assignee.

Among other things, after holding that the term "legal representatives" used in the policy included assignees, the Court said:

"A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to

cover a mere speculative risk, and thus evade the law against wager policies; and payment thereof may be enforced for the benefit of the assignee, and, under the system of procedure in many States, in his name. *Warnock v. Davis*, 104 U. S., 775, 780; *Archibald v. Mutual Ins. Co. of Chicago*, 38 Wis., 542, 545; *De Ronge v. Elliott*, 8 C. E. Green (23 N. J. Eq.) 486, 495. The assignee here, Hunter, represented that he was the special partner of Armstrong, and had placed \$5,000 in the partnership, and was apprehensive that he might be charged as a general partner. If he was a special partner the contract was not a wager policy. And as it was not a contract for the benefit of the wife of the assured, it does not fall within those cases where, for the protection of the beneficiary, the power of the assured to divert the course of payment is restricted.

“The assignment conveying to Hunter the *whole interest of the assured*, his representatives alone would have a valid claim under it, if the policy *were not void in its inception*. Proof, therefore, that he caused the death of the assured by felonious means *must necessarily have defeated a recovery*; and the Court erred in refusing to admit testimony tending to prove that such was the fact.” (P. 597.)

The italics are ours.

And after thus holding as error the exclusion of offered proof that Hunter obtained other and additional

insurance on the life of Armstrong under similar circumstances, the learned Judge said:

“But, independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired.” (P. 600.)

The judgment against the company was reversed.

It will be noticed that in this case, Judge Field cites the case of *Warnock v. Davis*, previously decided by him, for the very proposition maintained by the courts which follow the “majority” rule, namely that—

“A policy of life insurance, without restrictive words, is assignable by the assured for a valuable consideration equally with any other chose in action, where the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies.”

This is Judge Field’s own interpretation of his previous decision so much stressed by the learned Court of Appeals in the case at bar.

And it will be observed, in this connection, that Judge Field cites with approval the cases of *Archibald*

v. Mutual Life Ins. Co. of Chicago, 38 Wis., 542-545, and *De Ronge v. Elliott*, 8 C. E. Green (23 N. J. Eq.), 486-495, which are cases affirming the "majority" rule.

CROTTY V. UNION MUT. L. INS. CO., 144 U. S., 621.

(Decided in 1891.)

From U. S. Circuit Court, Northern District of California. Opinion by Mr. Justice Brewer.

The facts were: A policy of \$10,000 was issued to Michael O'Brien upon his life payable to him at the end of fifty-eight years, or if he should die within that time, then "to Michael Crotty, his creditor, if living; if not, to the said Michael O'Brien's executors, administrators, or assigns."

The suit was by Crotty upon the policy, who alleged in his complaint, among other things, "That plaintiff was at the time of effecting said policy of insurance, and at the time of the death of said Michael O'Brien, a creditor of said Michael O'Brien for various sums of money, which the plaintiff had at various times advanced to the said Michael O'Brien, amounting to several thousand dollars, and as such creditor had a valuable interest in the life of said Michael O'Brien." This averment was denied by the company, and no proof was offered by plaintiff except the policy and proofs of death.

The sole question was whether, upon this issue, thus squarely made, the policy and proofs of death

were sufficient evidence to make out the plaintiff's case calling for proof of indebtedness. The trial Judge instructed the jury to find for the defendant, and this action of the Judge was affirmed.

The learned Court of Appeals, in its opinion in the case at bar, quotes an expression from this opinion, in which, among other things, it is said:

"It is settled law of this Court that a claimant under a life insurance policy must have an insurable interest in the life of the insured. Wagering contracts in insurance have been repeatedly denounced," etc.

Viewed in the light of the parties and issues before the Court, this language was perfectly proper and pertinent. The plaintiff was a beneficiary by the terms of the policy as originally issued, named as a creditor, and the Court very properly held that his *only interest* in the policy was *as creditor and to the extent of his debt only*. He was not a purchaser or assignee of the policy—in fact, there was no question of assignment of the policy in the case. Moreover, the insurance company itself was sued and had not waived anything.

The case falls very far short of settling the rights of the assignor and assignee of life insurance, as between themselves, where the insurer has waived all objections and paid the money—in fact, it does not touch that subject.

We have thus gone through with the reported decisions of this Honorable Court bearing on the question under discussion. It is apparent that this Court has decided no case otherwise than it would have been decided by the application of either the "majority" or the "minority" rule, as we have stated them. In other words, no case has been before this Court in which the principle we are contending for was material to its decision. No case has been before this Court presenting the question of the assignability of a life insurance policy originally issued in good faith, to one who takes the same for a valuable consideration, with the knowledge and consent of the insurance company, and thus, in good faith, enables the policyholder to realize something of value on his policy, which would otherwise be forfeited for the non-payment of premiums.

And as indicating the general interpretation of the position of this Court on this question, by judges, text-writers and annotators, we make a short quotation from the able note of Judge Freeman to a case from 61 Neb., reported in 87 Am. St. Rep., p. 507. After analyzing the opinion of Judge Field in *Warnock v. Davis*, and quoting with approval the observations of the court in *Ins. Company v. Allen*, 138 Mass., 24; 52 Am. Rep., 24, to the effect that the noted remark of Judge Field in the *Warnock* case "was not necessary to the decision," Judge Freeman says:

"Such assignments are, of course, invalid, and the *real* position of this Court is shown by its lan-

guage in *Aetna Life Ins. Co. v. France*, 94 U. S., 561: 'As held by us in the case of *Insurance Co. v. Schaefer*, 94 U. S., 457, just decided, any person has a right to procure an insurance on his own life, and to assign it to another, provided it be not done by way of cover for a mere wager policy.' Similar language is used in *New York Mut. Life Ins. Co. v. Armstrong*, 117 U. S., 591."

A great many other cases have made similar observations or criticisms upon the language of Mr. Justice Field in *Warnock v. Davis*, and similar vindication of the *real* position of this Court on this question, and among them the following:

Bursinger v. Bank (Wis.), 58 Am. Rep., 848.

Crosswell v. Ins. Co., 51 S. C., 103; 28 S. E., 200.

Mchts. Nat. Bank v. Comins (N. H.), 101 Am. St. Rep., 657.

Fitzpatrick v. Ins. Co., 56 Conn., 116.

Steinback v. Diepenbrock, per Judge Parker, N. Y., 44 L. R. A., 417.

Chamberlain v. Butler, 61 Neb., 730.

Gordon v. Ware Nat. Bank, 132 Fed. Rep., 444.

So, while as before stated, no case has been presented to this Court which involved the exact state of facts we have in this case, its language in the *France*, *Schaefer* and *Armstrong* cases in 94 and 117 U. S., clearly puts this Court where it is classed by Mr. Bacon, Mr. May, Mr. Joyce, Mr. Vance, Judge Free-

man, Judge Sanborn (in *Gordon v. Ware Nat. Bank*) and numerous other judges.

We also call attention to the following extracts from the texts of May on Insurance (Ed. 1891), and of Vance on Insurance (1904).

Says Mr. May, sec. 398a:

"The doctrine that the assignment of a policy to one without interest in the life is as objectionable as the taking out of a policy without interest, does not seem good sense. If this is so, it is difficult to understand how the designation of a beneficiary outside of those having an insurable interest in the life can be upheld. There seems to be a clear distinction between cases in which the policy is procured by the insured *bona fide*, of his own motion, and cases in which it is procured by another. It is a very different thing to allow a man to create voluntarily an interest in his termination, and to allow some one else to do so at their will. The true line is the activity and responsibility of the assured, and not the interest of the person entitled to the funds. It is well established that a man may take out a policy on his own life payable to any person he pleases, and it is drawing a distinction without a difference to hold that he cannot take out a policy and afterwards transfer its benefits."

And Mr. Vance, in his recent most excellent treatise on Insurance, at pp. 140, 141, says:

"The validity of the assignment of a life policy to one having an insurable interest in the

life insured, is unquestionable, but there is much conflict of authority and consequent confusion in the law as to whether a valid assignment of a life policy can be made to one having no insurable interest. This confusion is due partly to the difficult nature of the principles involved, and partly to the misleading opinion delivered by Mr. Justice Field, of the Supreme Court of the United States, in the correctly decided case of *Warnock v. Davis*, following the preceding case of *Cammack v. Lewis*, decided by the same Court. These confusing influences have further been aided and abetted by a catch phrase, which, however, does not state the issue fairly, to the effect that the law will not allow a person to procure by assignment insurance that he could not procure directly. A fair statement of the issue is found in the postulate that the law will allow the insured to designate a beneficiary under the policy as well as by assignment as by original nomination.

“The true principle governing the question may be derived from the statement of some generally accepted rules of law:

(1) A person insuring his own life may designate any person whatever as beneficiary, irrespective of insurable interest in that beneficiary.

(2) The law requires an insurable interest only at the inception of the policy, as evidence of good faith. The presence of such interest at any subsequent period is wholly immaterial.

(3) Life insurance, though based on the theory of indemnity at its inception, is not a contract of indemnity, but chiefly of investment. As a chose in action, it has at any time after its issue a recognized value, termed the ‘reserve value.’

"Hence we conclude that a policy of life insurance, validly issued to one having an insurable interest, becomes in his hands a valuable chose in action, which should be assignable as any other property right, unless such assignment be opposed to some clear rule of public policy; that this right remains unimpaired in the hands of the original assured, even after the termination of the interest upon which its procurement was based, and there can be no sufficient reason for requiring an interest in the assignee which is not possessed by the assignor; and, finally, that there is no sufficient reason why the beneficiary designated by assignment of the policy after its valid issue should be subject to a different rule as to interest required from that applying to the beneficiary designated at the time of the issue of the policy. Since an insurable interest is not necessary in the latter, neither should it be required of the former."

And the same learned author, after stating the facts in *Warnock v. Davis*, comments on the opinion as follows, p. 142:

"It would be difficult to imagine a case showing more clearly than this a purpose to evade the rule of law forbidding wager policies, and to obtain indirectly insurance that the law would not allow directly. The real effect of the transaction was precisely the same as if the association had directly procured insurance upon the life of Crosser, in which they had absolutely no interest. The decision of the Court, therefore, in refusing to uphold such a masquerading assignment, was eminently just and proper. But the Court unfor-

tunately went far beyond the case decided, and made various general observations, which apply equally well to cases entirely different from the one giving occasion to them, and have on that account been productive of much loose thinking and confusing adjudication."

A recent examination into the status of the various States which have spoken through their courts on this subject, discloses the fact that only the States of Kansas, Alabama, Texas and Virginia now stand clearly and unequivocally on the side of the "minority" rule; while the States of Pennsylvania and North Carolina are in the doubtful column—decisions in those States seeming to point both ways, with probably the stronger inclination to the "minority" rule.

On the other hand, England, Canada, Nova Scotia, the United States Supreme Court, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Rhode Island, South Carolina, Tennessee, Vermont and Wisconsin are clearly and unequivocally ranged on the side of the "majority" rule. This will appear from the cases cited below:

Ashley v. Ashley, 3 Simmons, 149; 6 Eng. Chy. Rep., 149.

Dalby v. India & London Ass. Co., 15 C. B., 365.

Law v. London Policy Co., 1 Kay & J., 223.

- N. Am. L. Ass. Co. v. Craigen*, 13 Can. S. C., 278.
Vezina v. N. Y. L. Ins. Co., 6 Can. S. C., 30.
Matlock v. Bledsoe (Ark., 1905), 90 S. W., 849.
Curtis v. Aetna L. Ins. Co., 90 Cal., 255.
Sheets v. Sheets, 4 Colo., 450; 36 Pac. Rep., 310.
Fitzpatrick v. Hartford, etc., Ins Co., 56 Conn., 116; 7 Am. S. Rep., 288.
Bowen v. Nat. L. Assocn., 63 Conn., 460; 27 Atl., 1060.
Lemon v. Phoenix Mut. L. Ins. Co., 38 Conn., 294.
Rylander v. Allen, 125 Ga., 206; 6 L. R. A. N. S.), 128; also 41 Ga., 363; 109 Ga., 1; 112 Ga., 548; 93 Ga., 753; 122 Ga., 49.
A. O. U. W. v. Brown, 112 Ga., 545; 37 S. E., 890.
Bloomington M. B. Assn. v. Blue, 120 Ill., 121.
Martin v. Stubbings, 126 Ill., 387; 9 Am. St. Rep., 620.
Moore v. Chicago Guar. Fund Life Soc., 178 Ill., 202; 52 N. E., 882.
Davis v. Brown, 159 Ind., 644; 65 N. E., 908.
Millner v. Bowman, 119 Ind., 448; 5 L. R. A., 95.
Amick v. Butler, 111 Ind., 578; 60 Am. Rep., 722.
Hutson v. Merrifield, 51 Ind., 24.
Hearings' Suc., 26 La. An., 326.
Suc. of Miller v. Manhattan Ins. Co., 110 La. An., 654.
Stewart v. Sutcliffe, 46 La. An., 240; 14 So. Rep., 912.
Hurst v. Robinson, 78 Md., 67; 44 Am. St., 266; 20 L. R. A., 761.

- Souder v. Home Friendly Soc.*, 72 Md., 511;
20 Atl., 137.
- Rittler v. Smith*, 70 Md., 261; 2 L. R. A., 844.
- Clogg v. McDaniel*, 89 Md., 416; 43 Atl. Rep.,
795.
- Mut. L. Ins. Co. v. Allen*, 138 Mass., 564; 52
Am. Rep., 250.
- King v. Cram*, 185 Mass., 103; 69 N. E., 1049.
- Brown v. Greenfield Life Assn.*, 172 Mass.,
498; 53 N. E., 129.
- Dixon v. Nat. Life Ins. Co.*, 168 Mass., 48;
46 N. E., 430.
- Tateum v. Ross*, 150 Mass., 440; 23 N. E., 230.
- Prud. Ins. Co. v. Liersch*, 122 Mich., 436; 81
N. W., 258.
- Hogue v. Minn. Packing Co.*, 59 Minn., 39; 60
N. W., 812.
- Brown v. Equitable Life*, 75 Minn., 412; 79
N. W., 968, 1126.
- Murphy v. Red*, 64 Miss., 614; 60 Am. Rep., 68.
- Reynolds v. Prud. Ins. Co.*, 88 Mo. App., 678.
- McFarland v. Creath*, 35 Mo. App., 112.
- Chamberlain v. Butler*, 61 Neb., 730; 54 L.
R. A., 339.
- Mechanics' Nat. Bank v. Comins*, 77 N. H., 12;
101 Am. St., 650.
- Trenton Mut. L. Ins. Co. v. Johnson*, 24 N. J.
Law, 576-585.
- Vivar v. Knights Pythias*, 52 N. J. Law, 455-
469.
- Olmstead v. Keyes*, 85 N. Y., 593.
- Glassey v. Manhattan L. Ins. Co.*, 65 N. Y.,
St. R., 493.
- Valton v. Nat. L. Fund Assn.*, 40 N. Y., 21;
20 N. Y., 32.
- Rawes v. Am. Life Ins. Co.*, 27 N. Y., 282.

- *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y., 31; 64 Am. Dec., 529.
- Steinback v. Diepenbrock*, 158 N. Y., 24; 70 Am. St. Rep., 424; 44 L. R. A., 417.
- Cannon v. Mut. L. Ins. Co.*, 29 Hun., 470.
- Fuller v. Kent*, 13 N. Y. (App. Div.), 529.
- Wright v. Mut. Ben. Life Assn.*, 118 N. Y., 237 6 L. R. A., 731; 16 Am. St. Rep., 749.
- Eckel v. Renner*, 41 Ohio St., 232.
- Clark v. Allen*, 11 R. I., 439; 23 Am. Rep., 496.
- Crosswell v. Conn. Indemnity Assn.*, 51 S. C., 103; 28 S. E. Rep., 200.
- Lewis' Admr. v. Edwards*, Ms. Tennessee, December Term, 1903.
- Fairchild v. N. E. M. L. Ins. Co.*, 51 Vt., 613.
- Bursinger v. Bank of Watertown*, 67 Wisc., 76; 58 Am. Rep., 848.
- Hurd v. Doty*, 86 Wisc., 1; 21 L. R. A., 746.
- Archibald v. Mut. L. Ins. Co.*, 38 Wisc., 542.
- Clark v. Durand*, 12 Wisc., 223.
- Kernan v. Howard*, 23 Wisc., 108.
- Foster v. Gile*, 50 Wisc., 603.
- N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S., 591.
- Aetna L. Ins. Co. v. France*, 94 U. S., 561.
- Conn. Mut. L. Ins. Co. v. Schaefer*, 94 U. S., 457.
- Page v. Bernstein*, 104 U. S., 664.
- Gordon v. Ware Nat. Bank*, 132 Fed. Rep., 444.

It thus appears from a careful examination of the reports at the present time that England, Canada, the United States courts, so far as they can be said to have taken position at all, and the Supreme Courts of

twenty-four States of the American Union, have fairly placed themselves on the side of what we have called the majority rule; that is to say, they uphold assignments of insurance policies of the character involved in this case; while comparatively few courts—less than half a dozen—have distinctly taken the opposite view. And it has also been observed, and will be very clear from an examination of the cases cited, that the tendency of judicial decision in modern times is very strongly towards this majority rule.

In concluding, under this division of the brief, we respectfully submit that owing to the conflict between the decisions of the Circuit Courts of Appeals of the United States with respect to this question, and the different interpretations placed by these courts, as well as other courts and text writers, upon the expressions contained in the opinions of this Court, there is here presented a proper case, under the practice of this Court, for the issuance of the writ of certiorari.

II.

THERE IS NO PROVISION IN THE LIFE INSURANCE POLICY ITSELF WHICH MILITATES AGAINST THE RIGHT OF THE PETITIONER, AS ASSIGNEE, TO COLLECT THE AMOUNT OF THE POLICY.

The only provision in the policy which the Circuit Court of Appeals, in the case at bar, mentioned as at all bearing on the question of the validity of the assign-

ment, and which appears among the "Guaranteed Privileges, Benefits and Conditions" endorsed on the policy, is the following:

"Any claim *against the company*, arising under any assignment of this policy, shall be subject to proof of interest." (Tr., pp. 32, 33; Opinion, Tr., pp. 66, 67.)

We do not understand the opinion of the Circuit Court of Appeals in the case at bar, as being to any extent *grounded* upon the above quoted clause of the policy. This is true because, in the opinion, after expressing the view that this clause was not placed in the policy solely for the protection of the company, the learned Court of Appeals said:

"But, if there is no question of public policy involved in respect of the assignability of such contracts, the clause, in the circumstances of this case, is of *little consequence*. (Tr., p. 67.)

The learned Court of Appeals does, however, seem to attach some importance to this provision, and to give it some weight in its consideration of the main question, and for that reason we notice it here.

It is clear from the authorities that this provision of the policy was intended solely for the benefit of the company, and cannot be strained into a contract restriction against the assignment of the policy. By its very terms it is merely a right reserved to the company to require proof of interest when liability is asserted

against it by an assignee; and, according to practically all the authorities, being for the sole benefit of the company, it could be waived by it and became nugatory, when the company recognized the assignment, received premiums from the assignee, and paid the amount of the policy into the Court below, under its bill of interpleader, with an expressed indifference upon its part as to who should receive the fund.

It will appear by reference to the policy that it was payable to the "executors, administrators or *assigns*" of the insured. (Trans., p. 31.) A duplicate of the assignment was, immediately upon its execution, sent to the company, as appears by the stipulation (Trans., p. 29), and as has been seen the original bill of the company admitted notice of the assignment and its assent to it.

It will also be observed that all of the ten provisions endorsed on the policy under the heading, "Guaranteed Privileges, Benefits and Conditions," and from the sixth of which the above contract is quoted, referred to the reciprocal relations between the company and the insured and were obviously for the *protection of the company*. They did not undertake to prescribe limitations upon the dealings between the insured and third parties—except to declare the conditions upon which an assignee of the *policy would be recognized, as such, by the company*.

We submit that it is very clear that the provision under discussion was merely a condition imposed by

the company *for its own protection*, and might be and was waived by it. It is even so held where the policy declares that it **SHALL BE VOID** unless such and such things be done—cases much stronger than this.

In Bliss on Life Insurance, 445, it is said:

“Provisions declaring policies void in certain contingencies are inserted for the benefit of the insurers, and though the language in such cases usually is that the policy ‘shall be void,’ not ‘shall be voidable,’ yet it is a provision inserted *for the benefit of the company*, and may be waived by it.”

In 2 Cooley’s Briefs on the Law of Insurance, p. 1082:

“A provision in a policy that, in case of assignment, notice shall be given the company, has been held to amount to a contract that the policy may be assigned by giving such notice. And even though it is provided that the policy *shall not be assigned*, it is a provision that *the company only can take advantage of*, and if the company consents the assignment will be valid as against third persons.”

And in Vol. 1, p. 277:

“Provisions of the policy forbidding an assignment to one not having an insurable interest may be waived by the company, being inserted for its benefit.”

The same rule obtains as to fire insurance policies. Id. Vol. 2, p. 1859.

May on Insurance is to same effect. Sec. 384.

Speaking of such clauses, Joyce on Insurance, Vol. 3, sec. 2325, says:

"A clause of this nature rendering the policy void in case certain conditions as to the manner of making the assignment are not complied with is for the benefit of the insurers. They may insist upon a forfeiture or not as they may desire, and though the conditions as to assignment may be clearly violated, still if the insurers desire, they may elect to waive the violations of such conditions and treat the policy as a valid subsisting contract of insurance."

And so, in 1 Bacon Ben. Soc. & Life Ins., Sec. 298:

"This assent is a matter between the company and the person asserting the claim under the policy, and consequently an assignment may be good between the parties, although the assent of the company is required by the terms of the contract and has not been obtained."

And again, in sec. 310b:

"When the association pays the money into court" (in interpleader cases) "it waives the right to question the validity of the assignment. It follows that the Court, having possession of the fund, will dispose of it in accordance with the principles of equity and the limitations imposed by the statutes of the forum."

And in sec. 298:

"If the assignment is good under the law of the place where made, it is good everywhere, and the consent once given cannot be withdrawn unless given under a mistake or because of misrepresentation."

Numerous cases are cited in support of these texts.

Now by the very terms of the provision of the policy in question it applies only when a liability is sought to be established *against the company*. That provision, as has been seen, is "That any claim *against the company* arising under any assignment of this policy shall be subject to proof of interest." By its very terms, the company having waived the provision, paid the insurance money and retired from the case, the provision is no longer in force; and this is the effect uniformly given to such provisions, even though their language be much stronger.

In *Spencer v. Meyers*, 150 N. Y., 269; 34 L. R. A., 175, the contest was between the assignor and assignee over the proceeds of an insurance policy. The assignor was the wife of the insured, and the original beneficiary in the policy. The assignor and assignee were impleaded by the insurance company, which paid the money into court. The policy contained a provision "that no assignment of this policy shall be valid."

The Court said:

"The stipulations in the policy against an assignment do not affect the question as to the de-

fendant's (the assignee's) rights. Whatever force these clauses had, the company alone can take advantage of them, and as it has declined to, and paid the money into court, they do not concern the plaintiff."

In *Mechanics Nat. Bank v. Comins*, 72 N. H., 12; 101 Am. St. Rep., 650, the policy contained a provision exactly like the one in the present case, and the assignment was to one without insurable interest. The contest was between the assignor or his representative, and the assignee, the insurance company having paid the money into court. This provision of the policy was relied on to defeat the assignment. The Court, on this point, said:

"The provisions in the policy regarding assignment, upon which the defendant relies, were inserted for the protection of the company. The company has waived them by admitting liability and paying the money into court. They are not available to the defendant."

The Court Cites—

Knights of Honor v. Watson, 64 N. H., 517;
and
Brown v. Mansur, 64 N. H., 39.

The following cases are to the same effect, and we cite them without further comment:

Foster v. Preferred Acc. Ins. Co., 125 Fed. Rep., 536-542.
Clark v. Eq. Ins. Co., 143 Fed. Rep., 175.

Hurst v. Robinson (Md.), 44 Am. St. Rep., 266; 20 L. R. A., 761.

Hogue v. Min. Pkg. Co., 59 Minn., 39.

Myers v. Schuman, 54 N. J. Eq., 414; 34 Atl., 1066.

Johnson v. Van Epps, 110 Ill., 551.

Graff v. Mut. L. Ins. Co., 92 Ill. App., 207.

Oil City v. Gdn. Mut. L. Ins. Co., 5 Big. Ins. Cases, 478.

Jarvis v. Binkley, 206 Ill., 541.

Lee v. Murrell, 9 Ky. Law Rep., 104.

Conn. Mut. L. Ins. Co. v. Tucker (R. I.), 61 Atl., 142.

Powell v. Dewey (N. C.), 68 Am. St. Rep., 818.

Moore v. Ins Co. (Ill.), 52 N. E., 882.

Buckbee v. U. S., Ins. Co., 18 Barb. (N. Y.), 541.

Viele v. Germania Ins. Co., 26 Iowa, 9.

Burgess v. N. Y. Life Ins. Co. (Tex.), 53 S. W., 602.

Ramsey v. Meyers, Pa. Dist., 468.

So we submit that if the decision of the Court of Appeals in the case at bar, holding the assignment void, is in any respect grounded upon the above quoted provision of the policy, it is manifestly erroneous.

It is not to be overlooked that the provision in question does not require that an assignee, even in asserting his claim *against the company*, shall show an *insurable interest in the life insured*. It is simply that any such claim, that is, "*claim against the company arising under any assignment of this policy*," shall be "subject to proof of interest." Interest in what? It

does not say "in the life insured." The policy, on its face and by its very terms, is made payable to the "assigns" of the insured, if there be such; the sixth clause of the "Guaranteed Privileges, Benefits and Conditions" from which the provision in question is quoted, provides for notice to the company of assignments of the policy; and the policy nowhere provides that it shall be assigned only to persons with insurable interest in the life insured. If the claim of the assignee against the company be made as pledgee of the policy as security for debt, the company may obviously, under this clause, require him to establish his debt; if made as *owner*, under absolute purchase of the policy for value, does not the claimant establish his *interest*, in the sense of this clause, by showing that fact? We submit that he does. But at all events, as already shown, the requirement, whatever its scope, is alone for the benefit of the company which has waived it.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE CONTRACT OF ASSIGNMENT OF THIS LIFE INSURANCE POLICY, ADMITTEDLY MADE IN GOOD FAITH, WAS VOID UPON ANY SUPPOSED GROUND OF "PUBLIC POLICY," WHEN THE PREVIOUS HOLDINGS OF THE HIGHEST COURT IN THE STATE OF TENNESSEE, WHERE THE ASSIGNMENT WAS MADE AND PERFORMED, WHERE THE PARTIES WERE DOMICILED, AND WHERE THE LITIGATION AROSE, ARE TO THE CONTRARY.

It will not be questioned that by the decisions of the

Supreme Court of Tennessee, the assignment in question is good.

Lewis v. Edwards (M. S. Opin., 1903).
Rison v. Wilkerson, 3 Sneed, 565.
Mut. etc. Ins. Co. v. Hamilton, 5 Sneed, 269.
Tenn. Lodge v. Ladd, 5 Lea, 716.
Williams v. Carson, 9 Baxter, 516.
Clement v. Ins. Co., 17 Pick., 22.
Scobey v. Waters, 10 Lea, 551.
Gosling v. Caldwell, 1 Lea, 454.
Handwerker v. Diermeyer, 12 Pick., 619.
Wright v. Wright, 16 Pick., 313.

It is respectfully submitted that the question stated in above heading is one which deserves the most careful attention and scrutiny of this Honorable Court.

It was disposed of quite summarily by the learned Circuit Court of Appeals, on the ground that the question is not of the class in respect to which, under the rulings of this Honorable Court, the Federal Courts are bound to follow State *decisions*.

Whether this Honorable Court has hitherto had presented to it this precise phase of the subject of Federal and State comity or not, we shall not now undertake to say—at least we shall not go exhaustively into that question, as it would make this brief too long. We believe it has not, in any decided case, had presented to it, or considered, the arguments and reasons cogently suggested by the facts of this case for following State decisions declaring State policy and vested con-

tract rights in cases of the precise nature of the case at bar.

This case involves no Federal question—no right of the litigants which is touched or affected by the Federal Constitution, Treaties, or Acts of Congress. It happened to get into the Federal Court simply by reason of the fact that the insurance company which issued the policy, but was in no wise interested in the controversy, was a citizen of another State and chose to file its bill of interpleader in the Federal Court. The parties to the controversy from the beginning, and who only are now before the Court, are all citizens of Tennessee, contending over the validity of a contract made in Tennessee, fully performed by them in Tennessee, creating vested and valuable rights sanctioned and upheld by the laws and public policy of Tennessee, and the case is instituted in a tribunal sitting in Tennessee. Under these circumstances, it is respectfully submitted that whether the Federal Courts have hitherto held themselves *bound* to follow State decisions on more or less similar questions or not, every reason exists why they should do so in cases of exactly this nature, and that to fail to do so will lead to results most anomalous and confusing.

It was conceded by adversary counsel in the Court of Appeals—we quote from their brief—"That the contract of assignment is a separate and distinct contract from the contract which is so assigned which merely forms the *subject* of the contract of assignment," and

the authorities are uniform to that effect—we need not cite them, for they are all one way.

It is also practically a universal law of contracts that they are valid or invalid according to the law of the place where made, and this rule has been many times applied to assignments of insurance policies.

- Von Hoffman v. City of Quincy*, 4 Wall., 550.
Ogden v. Saunders, 12 Wheat., 259.
Fletcher v. Peck, 6 Cranch, 87.
White v. Hart, 13 Wall., 646.
Osborn v. Nicholson, Id., 654.
Walker v. Whitehead, 16 Wall., 317.
Edwards v. Kearzey, 96 U. S., 607.
Pritchard v. Norton, 106 U. S., 129.
Buchanan v. Bank, (C. C. A.), 55 Fed., 223.
Lehman v. Feld, 37 Fed., 852.
Ward v. Vosburgh, 31 Fed., 12.
Swann v. Swann, 21 Fed., 299.
Liverpool Steam Co. v. Ins. Co., 129 U. S., 397.
Coghland v. R. R. Co., 142 U. S., 101.
Pinney v. Nelson, 183 U. S., 148.
Speed v. May, 17 Pa. St., 91.
Spencer v. Meyers, 150 N. Y., 269.
Union Cent. L. Ins. Co. v. Woods, 11 Ind. App., 335.
Dundas v. Bowler, Fed. Cas. No. 4141.
Newcomb v. Mut. L. Ins. Co., Id. No. 10479.
Memphis Sav. Bank v. Houchins, 115 Fed., 96.
Watson v. Bonfils, 116 Fed., 157.
Suc. Miller v. Manhattan Ins. Co., 110 La. Ann., 654.
Lally v. Holland, 1 Swan (Tenn.), 399.
Allen v. Bain, 2 Head (Tenn.), 107.

- Miller v. Campbell*, 140 N. Y., 457.
Crouse v. Ins. Co., 56 Conn., 176.
Mut. L. Ins. Co. v. Allen, 138 Mass., 24.
Mut. Ben. L. Ins. Co. v. Bank, 68 Mich., 116.
Pomeroy v. Ins. Co., 40 Ill., 398.
Story on the Const., Sec. 1380.
Cooley's Const. Lim. (7th Ed.), pp. 404-5.
2 Lewis' Suth. Stat. Const. (2d Ed.), Secs. 660, 661.
9 Cyc., pp. 672, 673.
Whart, Conf. Laws, Secs. 487, 490.
Greenhood Pub. Pol., p. 46.
22 A. & E. Enc. Law (2d Ed.), 1329-1331 and 1343.
19 Id., p. 90.
Bacon Ben. Soc. & Life Ins., Secs. 297-8.
1 Joyce on Ins. (last Ed.), Sec. 232.
2 Cooley's Ins. Briefs, p. 1097.

The case of *Succession of Miller v. Manhattan Ins. Co.*, 110 La. Ann., 654, well states the principle supported by the above citations and is especially clear and full, both on the point that an assignment of a policy of insurance is a *separate and distinct contract* from that of the policy, and on the point that the assignment is governed by the *law of the place where it is made*. In that case, as in this, it was stipulated between the insured and insurer when the policy was issued that it was to be a New York contract. The assignment was made by the insured to his wife in Louisiana, where they both lived, and its validity was in dispute. The Court said:

"The assignment was made long after the insurance contract. It was a contract between Mill-

er and his wife, entered into at the place of their domicile, in Louisiana. The insurance contract between Miller and the insurance company and this assignment between Miller and his wife are not a single contract, but two distinct, separate contracts. Granting that the insurance contract itself is a New York contract, governed by the laws of the State of New York, as in fact it is, since the parties so agreed, the consequence does not follow that the assignment also is. The insurance contract was intended to govern the relations between the company and the holders of the policy, but not the relations between the assignor and assignee of the policy. It did not undertake to prescribe to whom Miller should make the assignment, nor by what form of contract he should make it—whether by sale or donation—nor to regulate his capacity and that of his assignee to enter into contractual relations with each other; and these are the very questions in controversy here. We think the contract between Miller and his wife must be held to be governed by the laws of Louisiana, the place of their domicile and of the contract. 'The validity of the assignment' of a policy of life insurance 'is to be determined by the law of the place where the assignment was made, and not by the law of the place where the policy was issued or the insurance payable.' (19 Am. & Eng. Enc. Law, 2d Ed., p. 90.) Incorporal rights follow the person of the owner, and the validity and effect of their transfer is governed by the law of the place where the transfer takes place."

It is the unquestioned theory of our judicial system that the laws in force *at the time and place* of a con-

tract inhere in and become part of it, so far as they are applicable to it.

Said Chief Justice Taney, in *Bronson v. Kinzie*, 1 How., 319, speaking of a mortgage contract made in Illinois prior to the passage of a statute giving a twelve months' right of redemption after sale:

"When this contract was made, no statute had been passed by the State changing the rules of law or equity in relation to a contract of this kind. None such, at least, has been brought to the notice of the Court; and it must, therefore, be governed, and the rights of the parties under it measured, by the rules above stated. They were the laws of Illinois at the time; and, therefore, entered into the contract and formed part of it, without any express stipulation to that effect in the deed. . . . So also, the rights of the mortgagee, as known to the laws, required no express stipulation to define or secure them. They were annexed to the contract at the time it was made, and formed part of it."

As more tersely said by the Court in *Von Hoffman v. City of Quincy*, 4 Wall., 550:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

But what is meant by the *law of the place of the contract*, which thus enters into and forms part of the contract?

In this country, where the *place of contract* is within a State, as in Tennessee, and not within the exclusive jurisdiction of the National Government, and the contract does not involve any subject covered by the paramount laws of the nation—and by these we mean the Federal Constitution, treaties, and lawful Acts of Congress—it is necessarily the municipal law of that State, whether customary or statutory, that is meant; all the cases and discussions on the subject proceed upon this idea. Said Mr. Justice Washington in the great case of *Ogden v. Saunders*, 12 Wheat., 257, 259:

“The law, then, which has this binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction, or discharge.

“But the question, *which law is referred to* in the above definition, still remains to be solved. It cannot, for a moment, be conceded that the *moral law* is intended, since the obligation which that imposes is altogether of the imperfect kind which the parties to it are free to obey or not, as they please.”

The learned Judge then takes up and discusses the “universal law,” or general law of all civilized nations,

and shows unanswerably that that cannot be meant, and concludes:

"It is, then, *the municipal law of the State, whether that be written or unwritten*, which is emphatically the law of the contract made within the State, and must govern it throughout, *wherever its performance is sought to be enforced.*"

It would be impossible to find, in all the books upon the law, a more terse, direct and felicitous statement of the general principle which governs the question under discussion, than the above language of Mr. Justice Washington; and while the case of *Ogden v. Saunders*, owing to the multiplicity of opinions delivered in it, has been the subject of much comment and some criticism, of its result, and the above language itself attempted to be qualified by some of the minority opinions, still, that language stands as the settled law of this country on three kindred propositions, namely.

1. That when it is said the law of the place of a contract governs, it is the *law of the State where the contract is made*, that is meant.

2. That the *law of the State* so referred to, is either the written or unwritten law of such State, that is, its statute or common law; and,

3. That the law of the State where a contract is made, in force at the time, inheres in the contract, as part of it and of its obligation, and is enforceable in whatever Court the controversy may arise.

In *Pritchard v. Norton*, *supra*, which involved the validity of an indemnity bond made in New York for the protection of a surety on an appeal bond in a Court of Louisiana, Mr. Justice Matthews, speaking for this Court, said:

"The Court below, in a cause like the present, in which its jurisdiction depends on the citizenship of the parties, adjudicates their rights *precisely as should a tribunal of the State of Louisiana according to her laws*; so that, in that sense, there is no question as to what law must be administered. But, in case of contract, the foreign law may, by act and will of the parties, have become part of their agreement; and, in enforcing this, the law of the forum may find it necessary to give effect to a foreign law, which, without such adoption, would have no force beyond its own territory. . . .

The principle is, that whatever relates merely to the remedy and constitutes part of the procedure is determined by the law of the forum, for matters of process must be uniform in the courts of the same country; but whatever goes to the *substance* of the obligation and affects the *rights of the parties*, as growing out of the contract itself, or inhering in it, is *governed by the law of the contract*."

The decisions of the Federal Courts on the question whether they will or will not follow State decisions in given cases, have not, we respectfully submit, been always clear and uniform; and we have found it impossible to deduce from them any general rule by

which all decided cases may be reconciled and future cases governed. Aside from express statutes, about which there seems to be no question, it may be said that the Federal Courts will, generally speaking, construe and apply the *common law* and the *general commercial law*—really a branch of the common law—for themselves; but where this has been done, it has generally been in matters of *tort*, matters of *diligence* or *negligence*, *measure of damages*, and the *construction and meaning of instruments and documents*.

Whether a contract between two citizens of a State, about a subject-matter not within the regulation of Congress, be valid on the one hand, or void as in violation of law or public policy on the other, is a question peculiarly for the courts of that State in the absence of a controlling statute. The different States formulate and maintain, through their *courts* no less than through their Legislatures, different and opposite policies on many subjects, which policies, when adopted and made local law, enter into and form parts of the contracts and dealings of their respective citizens. On such subjects, that is, subjects not embraced within the sphere of National legislation, it cannot in any true sense be said that the United States *has any public policy*. It is not the *ensor morum* of the citizens of the States. Its courts can have no *judicial policy*, such as the State courts have and are constantly declaring; and certainly it cannot be said that the Federal Courts have and are controlled by one public policy in one State and another and different public policy in another

State. To so say would be to say that the Federal Courts may have as many different public policies as there are States in the Union; but that would be absurd.

Now, whether or not the sale and transfer in good faith and for value by one citizen of a contract of insurance which he has honestly obtained and holds upon his own life, to another who has no interest in the continuance of his life, be good or bad, is more a question of *policy* than of principle. Certainly there is no principle of the common law which forbids such a transfer, for it has permitted, time out of mind, transfers of remainder and reversionary interests and expectancies without restriction as to the relation of the purchaser to the life tenant or ancestor—where the *principle* is essentially the same. On the policy of sustaining such sales and transfers, about three-fourths of the States of the Union which have spoken on the subject, as we have shown, have declared themselves in the affirmative.

Upon what principle, then, shall it be said that a Federal Court, sitting in one of these majority States, and in a suit between its citizens involving such an assignment made and consummated within the State in such way as to be entirely valid and binding according to its law and policy, should declare the assignment void and take away from one of the parties a valuable property right awarded to him by the laws of his State?

It is conceded that the assignment in question is valid by the laws of Tennessee. Have we two sets of laws in Tennessee applicable to contracts of this kind—a State law by which they are good, and a Federal law by which they are bad? Under such a condition, with what certainty could the citizens contract in such matters? A policy holder might sell his policy to his neighbor, get the money for it, and then move over the State line into another State and bring suit in a Federal Court in the State of his former residence and have his contract declared void. On the other hand, a policy holder may have carried his policy for twenty years, or fifty years, and become unable to carry it longer; he may be in want and suffering for the necessities of life; his policy may have a market value, if he could sell it freely and with assurance to the purchaser that he would secure and receive what he bought; but having no *relative*, within the insurable interest degree, able or willing to buy, and the general public, fearing that in some way they might get sued in the Federal Court and lose all, may refuse to buy; the policy lapses and the holder dies in poverty, although it was a valuable and salable asset according to the settled laws of his State.

Numerous illustrations, not only of hardships but of positive deprivations of right, might be suggested which would result from the affirmance of the decision of the Court of Appeals in this case.

The law and policy of Tennessee, declared by its Courts, sanctioning such assignments, are not in con-

flict with the Constitution, Treaties or Acts of Congress of the United States, nor with any principle of the common law. They cannot be nullified or reversed by the Federal Courts. They cannot be affected in any way by the decision of this case. They will remain the law and policy of the State irrespective of the result of this case. The situation is wholly unlike that of an appeal to the United States Supreme Court from a State Court decision on a Federal question, where the final result may be a reversal of the State Court on such question, and the establishment of a rule for guidance thereafter.

In a case like the present, passing by any question as to the binding force of the State law and policy upon the Federal Courts, the latter should, we think, as a matter of comity and for the harmony and repose of the domestic affairs of the State, follow the State law and policy.

But we respectfully submit that the question goes deeper than this.

Was not the right of Grigsby, the assignee in this case, at the time of the commencement of this suit, to receive the proceeds of the policy then held by him, a *vested right under the constitution and laws of his State*? Undoubtedly so. The decisions of his State had for years sanctioned and upheld such contracts; and these decisions were not in conflict with any provision of the Federal Constitution, treaties or statutes.

How, then, can the Federal Courts take from him this *vested right*?

The Federal Constitution declares that the *State* shall not do such a thing. Whence comes the *power* of the Federal *Courts* to do that which the highest law of the land, in substance and spirit, declares shall not be done by any one?

These are grave questions, and they merit the most thorough consideration of this Honorable Court.

Aside from this constitutional aspect of the subject, the whole question comes finally to these alternatives:

1. The Federal Judiciary must, on the one hand, follow State decisions upholding *contracts* and *vested rights* under laws based on the settled public policy of the States where the contracts are made, and in this way maintain consistency with the States respectively so long as they adhere to different local policies on the subjects involved; or

2. On the other hand, adopt distinctive "policies" of their own and force the States to conform to them, or to suffer the incalculable confusion, loss and inconvenience of having *two* policies prevailing in the State affecting *contracts* and *vested rights* under neither of which the citizen can ever be certain he will fall—and which will either preserve or destroy his property, according as he gets into a State or a Federal Court.

That the former of these obvious alternatives should be adopted, does not seem to admit of question.

Respectfully submitted.

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